

No. 12279

United States
Court of Appeals
For the Ninth Circuit.

ESTATE OF DELL HINDS HIGGINS, Deceased,
SYDNEY M. HIGGINS, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

AUG 26 1918

PAUL P. O'BRIEN
CLERK

No. 12279

United States
Court of Appeals
for the Ninth Circuit.

ESTATE OF DELL HINDS HIGGINS, Deceased,
SYDNEY M. HIGGINS, Executor,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Petition.....	3
Exhibit A—Notice of Deficiency.....	9
Exhibit B—Trust Indenture.....	12
Answer to Amended Petition.....	21
Appearances	1
Decision	127
Designation of Contents of Record on Review.	138
Docket Entries.....	1
Memorandum Findings of Fact and Opinion...	113
Findings of Fact.....	113
Opinion	126
Notice of Filing Petition to Review Decision of The Tax Court of The United States and As- signment of Errors.....	137
Petition to Review Decision of The Tax Court of The United States and Assignment of Errors	128
Proceedings	30

	INDEX	PAGE
Statement of Points on Which Petitioner Intends to Rely and Designation of Parts of the Record Necessary for Consideration.....		141
Stipulation of Facts.....		23
Witnesses, Petitioner's:		
Higgins, Sydney M.		
—direct		30
—cross		42
—redirect		77
—recross		78
Kendall, Helen B.		
—direct		85
—cross		100

APPEARANCES

For Petitioner:

GEORGE H. STONE
WM. D. MORRISON

For Respondent:

H. A. MELVILLE

Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, deceased,
SYDNEY M. HIGGINS, executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1946

May 13—Petition received and filed. Taxpayer notified. Fee paid.

May 14—Copy of petition served on General Counsel.

May 13—Request for hearing at Los Angeles filed by taxpayer. 5/16/46 Granted.

June 3—Amended petition filed. 6/3/46 Copy served.

1946

June 11—Notice of the appearance of George H. Stone as counsel filed.

June 24—Answer to amended petition filed by General Counsel.

June 27—Copy of answer served on taxpayer, Los Angeles, Calif.

1947

July 31—Hearing set Sept. 22, 1947, Los Angeles, Calif.

Sept. 22—Hearing had before Judge Opper on merits. Submitted. Stipulation of facts filed. Briefs due 11/6/47; replies 12/8/47.

Oct. 17—Transcript of hearing 9/22/47 filed.

Oct. 23—Motion for extension to Dec. 5, 1947 to file brief filed by taxpayer. 10/30/47 Granted.

Nov. 4—Motion for extension to Dec. 31, 1947 to file brief filed by General Counsel. 11/5/47 Granted.

Nov. 17—Motion for extension to Dec. 31, 1947 to file brief filed by taxpayer. 11/17/47 Granted.

Dec. 19—Brief filed by taxpayer. 12/30/47 Copy served.

Dec. 29—Brief filed by General Counsel.

1948

Jan. 26—Reply brief filed by taxpayer. Copy served.

Jan. 28—Reply brief filed by General Counsel.

1949

Feb. 16—Memorandum findings of fact and opinion rendered, Judge Opper. Decision will be entered for the respondent. Copy served 2/17/49.

Feb. 17—Decision entered, Judge Opper, Div. 14.

May 11—Petition for review by U. S. Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

May 12—Proof of service filed.

June 6—Designation of record with proof of service thereon filed by taxpayer.

The Tax Court of the United States

Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, deceased,
SYDNEY M. HIGGINS, executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of

deficiency, Los Angeles Division, LA: ET: 90D: NAB, dated March 20, 1946, and as a basis of their proceedings alleges as follows:

1. The petitioner is the Estate of Dell Hinds Higgins, Deceased, Sydney M. Higgins, Executor, with principal office c/o George H. Stone, 1004 San Diego Trust and Savings Building, San Diego 1, California. The return for the period here involved was filed with the Collector for the sixth district of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on March 20, 1946.

3. The taxes in controversy are estate taxes of the above-named estate, and in the amount of twenty-nine thousand nine dollars and sixty-nine cents (\$29,009.69). (The decedent's, Dell Hinds Higgins, death occurred March 3, 1945.)

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the estate tax of the petitioner the Commissioner has erroneously included in the value of the net estate the following item:

Additions to value of net estate transfers during decedent's life the sum of \$188,302.40.

(b) The Commissioner has erroneously included as a part of the gross value of the Estate of Dell Hinds Higgins the following item:

Corpus of a trust created by decedent March 24, 1928, (through error referred to in letter of defici-

ency as March 28, 1928) of the value at date of death \$188,302.40.

(c) The Commissioner has erroneously determined that the transfer of property to the trust during decedent's lifetime was made in contemplation of death and was intended to take effect in possession or enjoyment at decedent's death and subject to inclusion in the gross estate of decedent and comes within the provisions of section 811(c) of the Internal Revenue Code.

(d) The Commissioner has erroneously determined that the decedent reserved the power to alter, amend, revoke, or terminate the trust, and that the property transferred to the trust during decedent's lifetime is subject to inclusion in the gross estate of decedent under the provisions of section 811(d) of the Internal Revenue Code.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) A trust indenture dated the 24th day of March, 1928, was made and entered into by Dell M. Harrow, who later became known as Dell Hinds Higgins, (now deceased) and the Bank of Italy National Trust and Savings Association, subsequently The First National Trust and Savings Bank of San Diego, California, became trustee under the said trust indenture.

The trustor (now deceased) did by the said indenture irrevocable divest herself without reversion of the corpus of the property transferred to the trustee. A copy of the said trust indenture is

marked Exhibit B attached hereto and made a part hereof.

(b) The petitioner contends the decedent was approximately 59 years of age at the date of the trust indenture, which was March 24, 1928, in good health, did not make the gift or transfer the property in contemplation of death, and lived to the age of about 76 years, which was approximately 17 years after the trust indenture was entered into.

(c) The petitioner contends that no part of the corpus of the trust created by decedent March 24, 1928, as valued at date of death, in the sum of \$188,302.40, should be included as a part of either the gross or net Estate of Dell Hinds Higgins, Deceased.

(d) The petitioner contends that the transfer of the property as set out in the said trust indenture of March 24, 1928, which by its terms was irrevocable, fully, completely, and without reversion divested the trustor of the property transferred during her lifetime, was not made in contemplation of death and was not intended to take effect in possession or enjoyment at decedent's death, but was effective at the date of the trust indenture, namely March 24, 1928, and that the value of the property in controversy in the sum of \$188,302.40, does not come within the provisions of section 811(c) as was erroneously determined by the Commissioner.

(e) The petitioner contends that the trustor (now deceased) did not reserve unto herself the power to alter, amend, revoke, or terminate the

trust, that on March 24, 1928, the trustor fully, completely, and without reversion divested herself of the property in controversy valued at date of decedent's death at \$188,302.40, and the said trust is not subject to inclusion in either the net or gross estate under the provisions of section 811(d) as was erroneously determined by the Commissioner.

(f) The petitioner contends that the decedent transferred the property, which at the time of her death was valued by the Commissioner at \$188,302.40, fully, completely, and without reversion and at the date of the transfer which was March 24, 1928, neither section 811(c) nor 811(d) of the Internal Revenue Code had at that time been enacted by Congress. The Commissioner erroneously construed the aforesaid sections of the Code as applicable to the value of the trust property at the date of the decedent's death and erroneously determined a deficiency of estate tax liability of \$29,009.69.

(g) The petitioner contends the inclusion of the value of the trust property in either the net or gross value and the determination of a deficiency of estate tax, or the assessment of a tax thereon, is erroneous on the part of the Commissioner and is contrary to the fourteenth amendment to the Constitution of the United States of America.

6. Wherefore, the petitioner prays this Court may hear the proceeding and determine that there

is no deficiency due from the petitioner in the sum of \$29,009.69, or any other sum.

/s/ GEORGE H. STONE,
Counsel for Petitioner.

/s/ WM. D. MORRISON,
Counsel for Petitioner.

State of California,
County of San Diego—ss.

Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ SYDNEY M. HIGGINS.

Subscribed and sworn to before me this 28th day of May, 1946.

[Seal] /s/ DORA C. GEISHCHLER,
Notary Public in and for County of San Diego,
State of California.

My commission expires April 12, 1950.

EXHIBIT A

Copy

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

March 20, 1946.

Office of
Internal Revenue Agent
in Charge
Los Angeles Division
LA :ET :90D :NAB

Estate of Dell Hinds Higgins, Deceased
Mr. Sydney M. Higgins, Executor
c/o Mr. George H. Stone
1004 San Diego Trust & Savings Building
San Diego, California

Dear Mr. Higgins:

You are advised that the determination of the estate tax liability of the above-named estate discloses a deficiency of \$29,009.69, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Wash-

ington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf.

The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner,

By /s/ GEORGE D. MARTIN,

Internal Revenue Agent in
Charge.

NAB:vmc

Enclosures:

Statement

Form of waiver

LA :ET :90D :NAB

District of Sixth California

Estate of Dell Hinds Higgins

Date of death: March 3, 1945

STATEMENT

	Liability	Assessed	Deficiency
Estate tax	\$29,009.69	\$ 0.00	\$29,009.69

In making this determination of the federal estate tax liability of the above-named estate, careful consideration has been given to the report of examination dated December 22, 1945, to the protest dated February 15, 1946, and to the statements made at the hearing on March 12, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. George H. Stone, 1004 San Diego Trust & Savings Building, San Diego, California, in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO NET ESTATE:

Net estate for basic tax as disclosed by the return.....		(\$ 97,071.11)
Additions to value of net estate and decreases in deductions:		
Transfers during decedent's life	\$188,302.40	188,302.40
Net estate for basic tax as adjusted....		\$ 91,231.29
Net estate for additional tax as adjusted		\$131,231.29

EXPLANATION OF ADJUSTMENTS

Transfers during decedent's life—

The value of the following described property, transferred by the decedent in her lifetime, is included in the gross estate, it being determined that such transfer was made in contemplation of death and was intended to take effect in possession or enjoyment at decedent's death and comes within the provisions of section 811(c) of the Internal Revenue Code, and that as decedent reserved the power

to alter, amend, revoke, or terminate the trust, it is subject to inclusion in the gross estate under the provisions of section 811(d) of the Internal Revenue Code:

	Returned	Determined
Corpus of a trust created by decedent		
March 28, 1928, of the value of at date		
of death	\$ 0.00	\$188,302.40
	COMPUTATION OF ESTATE TAX	
	Returned	Determined
Gross estate for		
basic tax	\$ 5,406.27	\$193,708.67
Deductions	102,477.38	102,477.38
	____	____
Net estate for basic tax.(\$ 97,071.11)	\$ 91,231.29	
Net estate for additional		
tax	\$ 0.00	\$131,231.29
Gross basic tax.....	\$ 1,324.63	
Credit for estate and		
inheritance tax	1,059.70	
	____	____
Net basic tax.....		\$ 264.93
Total gross taxes (basic and		
additional)	\$ 30,069.39	
Gross basic tax.....	1,324.63	
	____	____
Net additional tax.....		28,744.76
	____	____
Total net basic and additional taxes....		\$ 29,009.69
Total tax payable		\$ 29,009.69
Estate tax assessed.....		0.00
	____	____
Deficiency		\$ 29,009.69

EXHIBIT B

Copy

Trust Indenture

This Indenture made and entered into this 24 day of March, 1928, by and between Dell M. Harrow, hereinafter referred to as "Trustor," and

EXHIBIT B—(Continued)

Bank of Italy National Trust and Savings Association, a national banking association, organized and existing under the laws of the United States of America, hereinafter referred to as "Trustee,"

Witnesseth:

1. Trustor hereby grants, assigns and transfers unto Trustee, and its successors in trust, all of Trustor's right, title and interest in and to the following described property, to wit:

(Description of original trust property.)

(Omitted)

.....
.....

This grant, assignment and transfer of said property is in trust and strictly upon the trusts and confidences hereinafter set forth. Trustor agrees to execute and deliver to the Trustee, or its successors in trust, all such further grants, assignments and transfers as may be necessary to fully vest title to all of the above described property in said Trustee, or its successors in trust, and similarly agrees, as required, to endorse whatever notes, securities or other documents require such endorsement, and in general agrees to do any and all things necessary or convenient to fully vest title to all of the above property in said Trustee, or its successors in trust.

2. This grant, assignment and transfer of said property is in trust and strictly upon the trusts and confidences hereinafter set forth. The Trustee hereby acknowledges and declares that it has given

EXHIBIT B—(Continued)

no consideration to the Trustor for any of the above described property, and the Trustee hereby receives and accepts all of said above described property upon the trusts and confidences hereinafter set forth, and the Trustee hereby declares that it holds all of said above described property upon said trusts hereinafter set forth, and the Trustee hereby promises and agrees to fully and faithfully carry out and perform each and every provision of this trust as hereinafter set forth.

3. The Trustee shall perform the following duties and shall have the following described powers in respect to the property hereinabove described (hereinafter referred to as the "Trust Estate") to wit:

a. The Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments shall be on such security or in such securities as may be lawful for the investment of the funds of savings banks in the State of California; the Trustee shall act with diligence to so hold and manage the Trust Estate and the property and funds of the Trust Estate that the net income of the Trust Estate shall be as large as possible within the limit of the restrictions hereinbefore set forth.

b. The Trustee shall collect and receive all the income and profits of the Trust Estate and shall

EXHIBIT B—(Continued)

pay out and disburse the same as hereinafter provided.

c. The Trustee shall be permitted to hold any real property coming into its possession by reason of foreclosure of mortgage or sale under any trust deed, or otherwise, a reasonable length of time if it shall be necessary to hold such real property over a period of time in order to dispose of the same to the best advantage of the Trust Estate; no obligation of the Trustee assumed under this agreement shall be deemed to require the Trustee to sacrifice any real property, or any other property of the Trust Estate, in order to convert such property into income producing investments.

d. The Trustee is authorized and empowered, and it shall also be the duty of the Trustee to preserve and protect the Trust Estate in every manner and in every way and to pay all taxes and insurance necessary to be paid in respect to the Trust Estate and to keep, preserve and repair all real property and all other property of the Trust Estate.

e. In the event that legal service or legal advice may be necessary in order to preserve or protect the Trust Estate the sole right to select and appoint the attorney or attorneys to represent the Trust Estate shall be in any two of the following persons, to wit: (1) The Trustor; (2) Helen B. Kendall; and (3) Sydney M. Higgins; after the death of the Trustor such right to appoint and select such attorney or attorneys shall be in the said Helen B. Ken-

EXHIBIT B—(Continued)

dall and Sydney M. Higgins, or the survivor of them.

f. The Trustee shall pay out of the corpus of the Trust Estate the funeral expenses of the Trustor, upon the death of Trustor, The Trustee shall also pay out of the corpus of the Trust Estate all inheritance and estate taxes owing by the estate of the Trustor or by the beneficiaries herein designated upon the death of Trustor.

4. Out of the gross income of the Trust Estate the Trustee shall pay the costs and expenses of the Trust Estate, including taxes, insurance, etc., reasonable attorney's fees and reasonable fees for the services of the Trustee in the management of the Trust Estate.

5. During the continuance of this trust the net income of the Trust Estate remaining after payment of the costs and expenses of the administration and management of this Trust shall be paid by the Trustee as follows:

A. During the lifetime of the Trustor:

a. Seventy-five dollars (\$75) per month to Helen B. Kendall, or if she be dead to her issue by right of representation.

b. Seventy-five dollars (\$75) per month to Sydney M. Higgins, or if he be dead to his issue by right of representation.

c. The entire balance of the net income of the Trust Estate to the Trustor.

B. After the death of the Trustor:

EXHIBIT B—(Continued)

In equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of said beneficiaries then the share of such beneficiary shall be paid to the issue of such deceased beneficiary by right of representation.

6. This trust shall cease and terminate upon the death of the survivor of Dell M. Harrow (Trustor herein) Helen B. Kendall and Sydney M. Higgins. Upon the termination of this trust, as herein provided, the entire corpus of the Trust Estate shall go to and be distributed among the issue of Helen B. Kendall and Sydney M. Higgins, by right of representation, that is to say, one-half ($\frac{1}{2}$) of the entire corpus of the Trust Estate to the issue of Helen B. Kendall, by right of representation, and one-half ($\frac{1}{2}$) of the entire corpus of the Trust Estate to the issue of Sydney M. Higgins, by right of representation. If there is no living issue of one or the other of Helen B. Kendall or Sydney M. Higgins at the time of the termination of this trust, then the entire corpus of the Trust Estate shall go to the issue of the other, and if there is no issue of either Helen B. Kendall or Sydney M. Higgins living at the time of the termination of this trust then the entire corpus of the Trust Estate shall go to the respective heirs at law of Helen B. Kendall and Sydney M. Higgins, as said Heirs at law are indicated in Section 1386 of the Code of Civil Procedure of the State of California, one-half ($\frac{1}{2}$) of the corpus of the Trust Estate to the heirs at law of Helen B.

EXHIBIT B—(Continued)

Kendall and one-half (1/2) to the heirs at law of Sydney M. Higgins.

7. If it should happen during the continuance of this trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts.

8. Each and every beneficiary under this trust is hereby restrained from and are and shall be without right, power and authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate, or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, claims and estates in and to the income and/or principal of this trust during the entire term hereof, nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary nor subject nor liable to any process of law or court, and all of the income and/or principal under this trust shall be transferable, payable and deliverable only, solely, exclusively and personally to the above des-

EXHIBIT B—(Continued)

ignated beneficiaries hereunder at the time entitled to take the same under the terms of this trust, and the personal receipt of the designated beneficiary hereunder shall be a condition precedent to the payment or delivery of the same by said Trustee to each such beneficiary.

9. This trust shall be irrevocable. However, the Trustor during her lifetime reserves the right from time to time to appoint a new and different Trustee to execute the trusts herein set forth and upon designation in writing by the Trustor of such new Trustee the Trustee herein shall turn over to such new Trustee all of the Trust Estate and the Trustee shall furnish the new Trustee with copies of all such records and accounts pertaining to the Trust Estate as the new Trustee may reasonably require, and upon such appointment and upon such delivery of the Trust Estate to such new Trustee the new Trustee shall succeed to all the powers and obligations of the Trustee herein designated, as hereinabove set forth in this agreement. The Trustor shall be restricted in the designation of a new Trustee to an incorporated trust company authorized to do a trust business in the State of California under the laws of either the State of California or the laws of the United States. After the death of Trustor the same right to designate and appoint a new Trustee shall continue in Helen B. Kendall and Sydney M. Higgins, or the survivor of them.

In Witness Whereof the Trustor has set her hand

EXHIBIT B—(Continued)

and seal and the Trustee has caused this instrument to be executed by its properly authorized officers the day and year first hereinabove written.

/s/ DELL M. HARROW,
Trustor.

BANK OF ITALY NATIONAL
TRUST AND SAVINGS
ASSOCIATION,

By /s/ E. O. HODGE,
Vice-President.

By /s/ R. E. HAGENBRUCH,
Assistant Trust Officer,
Trustee.

State of California,
County of San Diego—ss.

On the 24 day of March 1928, before me, Gudmund Eiriksson, a Notary Public in and for the County of San Diego, State of California, personally appeared Dell M. Harrow, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the County of San Diego, the day and year in this certificate first above written.

/s/ GUDMUND EIRIKSSON,
Notary Public in and for the County of San Diego,
State of California.

EXHIBIT B—(Continued)

State of California,
County of San Diego—ss.

On this 26th day of March, 1928, before me H. D. BEEKLEY, a notary public in and for said County of San Diego, State of California, residing therein, duly commissioned and sworn, personally appeared E. O. Hodge, known to me to be the vice president, and R. E. Hagenbruch, known to me to be the Assistant Trust Officer of Bank of Italy, National Trust and Savings Association, the corporation that executed the within instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the County of San Diego, the day and year first above written.

/s/ H. D. BEEKLEY,
Notary Public in and for the County of San Diego,
State of California.

Received June 3, 1946. T.C.U.S.

Filed and Docketed June 3, 1946. T.C.U.S.

〔Title of Tax Court and Cause.〕

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of

Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the amended petition.

4(a) to (d), inclusive. Denies the allegations of error contained in subparagraphs (a) to (d), inclusive, of paragraph 4 of the amended petition.

5(a) to (g), inclusive. Denies the allegations contained in subparagraphs (a) to (g), inclusive, of paragraph 5 of the amended petition.

6. Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, ECC

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
H. A. MELVILLE,
Special Attorneys,

Bureau of Internal Revenue.

Received June 24, 1946. T.C.U.S.

Filed and Docketed June 24, 1946. T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue and the above entitled Petitioner, by their respective and undersigned attorneys, that the following facts may be accepted as true reserving to either party the right to introduce any proper evidence not inconsistent therewith:

Facts

1. The decedent, Dell Hinds Higgins, was born May 31, 1869, and died March 3, 1945. At the time of her death she was a resident of the County of San Diego, State of California. Her last Will and Testament was admitted to probate and petitioner, Sydney M. Higgins, was duly appointed and qualified as Executor. Petitioner filed a Federal Estate Tax return for decedent's estate with the Collector of Internal Revenue for the Sixth District of California on or about May 15, 1945, which may be received in evidence as petitioner's and respondent's Joint Exhibit 1-A, with the understanding that it may be withdrawn by the respondent and a photostatic copy substituted therefor.

2. In 1887 decedent married Albert Edward Higgins. Two children were born of said marriage, a son, Sydney M., born March 2, 1889, and a daughter, Helen B., born July 17, 1894. Helen was married on April 10, 1917, to Kenneth Kendall and thereafter her name has been Helen B. Kendall. The decedent's first husband died in 1913. Both

children survived their parents and are still living.

3. On April 9, 1925, decedent married Samuel Harrow who divorced decedent and received a final decree of divorce July 6, 1929. On August 30, 1929, decedent had her name changed back to Higgins.

4. On March 24, 1928, decedent created a trust, a photostatic copy of which is attached hereto as Joint Exhibit 2-B. To this trust the decedent transferred everything she owned, except her car, her jewelry, a savings account with Southern Trust and Commerce Bank, San Diego, California, number 80159, in the sum of \$5,418.51, and her salary of \$70.00 per month as Vice President of Hinds Estate, Inc. In said trust Bank of Italy National Trust and Savings Association, was named as Trustee, which was subsequently changed by action of the Trustor to San Diego Trust & Savings Bank and subsequently again changed by the further action of the Trustor to The First National Trust and Savings Bank of San Diego which was the Trustee from March 13, 1942, to the date hereof.

5. She had the trust prepared as irrevocable by her attorney and in such form as he advised would not be subject to Federal Estate Tax.

6. That on February 6, 1941, the Trustor and her two children, beneficiaries thereunder, filed in the Superior Court of the State of California against San Diego Trust & Savings Bank, then Trustee under said trust, their Complaint for declaration of rights under trust indenture and for equitable relief. A certified copy of said complaint is attached hereto as Joint Exhibit 3-C.

7. That Answer by San Diego Trust & Savings Bank as Trustee was filed February 25, 1941, a certified copy of which is attached hereto as Joint Exhibit 4-D.

8. Thereupon the Court, on March 13, 1941, entered its Decree, a certified copy of which is attached hereto as Joint Exhibit 5-E.

9. On April 19, 1941, the Trustor and her two children, beneficiaries, filed in said Court notice of motion to vacate and set aside the judgment entered March 13, 1941, on the grounds of mistake and inadvertence as set forth in the affidavit of George H. Stone attached to said motion. Certified copies of said motion and affidavit are attached hereto as Joint Exhibits 6-F, 1 and 2. Trustee appeared by counsel pursuant to motion, which motion and appearance are referred to in the decree and the said decree is the document identified in paragraph 10 as Joint Exhibit 7-G.

10. On April 21, 1941, the said Court made its decree, a certified copy of which is attached hereto as Joint Exhibit 7-G.

11. The Trustor and her two children, beneficiaries under said trust, on May 27, 1943, filed a Petition for an order allowing payment from the corpus of the trust. A certified copy of said Petition is attached hereto as Joint Exhibit 8-H. Affidavit of Mailing Notice to the Trustee, which Notice was dated May 27, 1943, was filed on June 1, 1943.

12. On June 11, 1943, Order of the Court allowing payment from corpus as prayed for was en-

tered. A certified copy of said order is attached hereto as Joint Exhibit 9-I.

13. On October 25, 1943, Trustor and her two children, beneficiaries under said trust, filed their petition for order allowing additional payment from corpus of the trust. A certified copy of said petition is attached hereto as Joint Exhibit 10-J. Affidavit of Mailing Notice to the Trustee, which Notice was dated November 5, 1943, was filed November 5, 1943.

14. On November 19, 1943, said Trustor and her children, beneficiaries, filed their Amendment to Petition for order allowing additional payments from the corpus of the trust. A certified copy of said Amendment to Petition is attached hereto as Joint Exhibit 11-K. Notice of Hearing was given on original Petition as stated in paragraph 13 hereof.

15. On November 19, 1943, Order of the Court was made allowing additional payments from corpus of the trust. A certified copy of said Order is attached hereto as Joint Exhibit 12-L.

16. That pursuant to said Order said Trustee during the year 1943, subsequent to the Order of Court of June 11, 1943, paid out of corpus of the trust to the Trustor as beneficiary, pursuant to said Order the sum of.....:\$ 624.06
Paid in 1944 pursuant to said Order..... 1,175.17
Paid in 1945 prior to Trustor's death
March 3, out of corpus, pursuant to said
Order 130.25

Total payments out of corpus.....	\$1,929.48
-----------------------------------	------------

No corpus was ever used for the benefit of either of the two children of Trustor, beneficiaries in said trust. Subsequent to the death of the decedent, there was paid out of the corpus of the trust estate the following items:

4/10/45—Bradley-Woolman Mortuary	
funeral expenses	\$ 574.94
8/22/45—W. S. Heller, County Treasurer	
California State Inheritance Tax	
in matter of Estate of Dell Hinds	
Higgins, deceased, per order of	
fixing Inheritance Tax dated	
8-1-45	3,262.44

An Affidavit setting forth the said items is attached hereto as Joint Exhibit 13-M. The items shown in the two Schedules, J and K, of the Estate Tax Return, identified herein in paragraph 1 as Joint Exhibit 1-A, were all paid out of the Estate of decedent and not out of the trust, except the item of funeral expense shown in Schedule J, Item 1.

17. At the date of the death of the decedent, March 3, 1945, there was property in the trust which she created on March 24, 1928, as set out in certified copy of an inventory which is attached hereto as Joint Exhibit 14-N.

18. At the time of the death of the decedent, namely, March 3, 1945, she owned only her car which was sold to her daughter, Helen B. Kendall, her jewelry, and other personal effects as shown in Schedule F of Joint Exhibit 1-A, which were dis-

posed of in accordance with her will dated April 8, 1940, a copy of which is attached to Joint Exhibit 1-A, and cash amounting to \$1,980.27 as shown in Schedule C of Joint Exhibit 1-A.

/s/ GEORGE H. STONE,
Counsel for Petitioner.

/s/ WM. D. MORRISON,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT,
ECC.

Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

Filed Sept. 22, 1947.

The Tax Court of the United States

Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, De-
ceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Before: Honorable Clarence V. Opper,
Judge.

Appearances:

GEORGE H. STONE,
Suite 1004 San Diego Trust
and Savings Building,
San Diego, California

and

WILLIAM D. MORRISON,
825 Bank of America Building
San Diego 1, California,
Appearing for the Petitioner.

H. ARLO MELVILLE,
HONORABLE CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue,
Appearing for the Respondent. [1*]

* Page numbering appearing at top of page of original Reporter's
Transcript.

PROCEEDINGS

* * *

Whereupon,

SYDNEY M. HIGGINS

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Sydney M. Higgins.

Direct Examination

By Mr. Stone:

Q. Mr. Higgins, you are a little hard of hearing, I believe? A. I am.

Q. And that is of some recent occasion, is it?

A. Pardon?

Q. You have not been hard of hearing very long?

A. No, I have not.

Q. How long?

A. 1945, the last day of May.

Q. What caused it?

A. I went out on a destroyer, and my hearing was destroyed by gun fire.

Q. You will have to talk a little louder.

A. I am having difficulty getting used to this thing. My hearing was destroyed by gun fire on a destroyer at sea the last day of May, 1945. [17]

Q. You were in the service in the Navy at that time?

A. Yes, sir, United States Naval Reserve as a commander.

(Testimony of Sydney M. Higgins.)

Q. For how long?

A. Since August, 1942.

Q. And before that what was your occupation or business? A. Insurance business.

Q. Where?

A. In San Francisco, California.

Q. Where were you living at that time in the insurance business?

A. Where was I living?

Q. Yes.

A. I was living in San Anselmo, Marin County.

Q. That is near San Francisco?

A. That is near San Francisco, north of San Francisco.

Q. Where were you living in March, 1928?

A. I was living in San Anselmo.

Q. What was your business at that time?

A. I was in the insurance business.

Q. You are the son of Dell Hinds Higgins?

A. I am.

Q. And she was at one time named Dell Harrow by a second marriage? [18]

A. That is correct.

Q. How old are you? A. I am 58.

Q. Did you know when the trust that is in question here was made, which was on March 24, 1928? A. I did.

Q. Were you present in San Diego while it was being discussed by your mother?

A. I was.

(Testimony of Sydney M. Higgins.)

Q. How did you happen to be in San Diego for that occasion?

A. A doctor at Paradise Sanitarium where my mother was staying telephoned to me a certain occurrence had taken place and I should come down immediately.

Q. What was that occurrence you refer to?

A. Well, sometime prior to this Mr. Harrow had been making demands upon my mother for money constantly—

Mr. Melville: Just a minute. It is not clear from this witness' testimony whether he is now telling what the doctor told him or what somebody else told him.

Mr. Stone: I think you should limit it to what the doctor told you at that time.

Mr. Melville: I object to that, your Honor. It is hearsay.

The Witness: My mother wrote me. [19]

Mr. Melville: I object, your Honor. That is hearsay.

The Witness: No, it is not hearsay, because my mother wrote me letters.

Mr. Stone: Just a minute, please, until the court rules.

The Court: As I understand, you are trying to prove what the doctor said because you want to get it in the record and not to prove the fact, is that correct?

Mr. Stone: That is correct.

(Testimony of Sydney M. Higgins.)

The Court: I will overrule the objection.

Q. (By Mr. Stone): Answer the question as to what the doctor told you.

A. The doctor told me that Mr. Harrow was coming out there quite frequently and disturbing my mother by making demands upon her for advances, that is, demands for money, and my mother wrote me the same thing, many, many letters, and I never could persuade her against Harrow at that time, and we felt that——

Q. Just go on. What else, if anything, did the doctor tell you in that conversation?

A. The doctor told me that that morning my mother had walked downstairs from her room and was sitting out in the front garden, had a chair, that Harrow came to her [20] and conversed with her and suddenly stepped off a few feet and threw a bunch of keys at my mother and hit her in the face. It was seen by the doctor and was seen by people sitting in the immediate vicinity, and my mother immediately realized the sort of man he was and the doctor telephoned me to come down immediately and I did.

Q. Was your mother injured at all by those keys?

A. Yes, she was cut in the face.

Q. You saw the cut?

A. I saw the cut.

Q. What was that, Paradise Valley Sanitarium, you say?

(Testimony of Sydney M. Higgins.)

A. That is where the happened.

Q. That is in National City near San Diego?

A. National City near San Diego.

Q. What was she there for in the hospital, in the sanitarium?

A. Well, she was in rather a nervous condition and she wanted to get away from Mr. Harrow, and the only means that she could find was to go to a place like that where he could not follow her.

Q. And when you came down there, did you have any discussion with her in regard to a trust?

A. No, I just discussed the situation with her, and after leaving her I went into San Diego and not knowing what [21] action to take, and I met an old friend of mine, who is a very prominent attorney in San Francisco, and I told him the situation and he said, "I think I know the answer to that. I think I know how, what can be done to make him get out once and for all. And he said, "I think we could take all of her property and put it in a trust and completely beyond her control or anybody else's control so that he would be unable to get a cent."

Now, he had come out, my mother told me that the reason for his throwing the keys was that he had brought certain papers out there for her to sign giving him all of her property, and it was her refusal to sign that paper that caused him to get angry and throw the keys and hit her.

Q. What was the name of this attorney you spoke of? A. Roland Foerster.

(Testimony of Sydney M. Higgins.)

Q. Do you know the name of the firm that he is connected with?

A. Foerster Hohfeld Morrison—four or five names.

Q. Could it be Morrison Hohfeld Foerster Shuman & Clark?

A. That is the San Francisco firm; yes, sir.

Q. They also have a San Diego office?

A. They also have a San Diego office.

Q. Well, he had a big interest in it?

A. Yes, he was a partner. [22]

Q. Now, did Mr. Foerster discuss with your mother the general subject of the trust?

A. No, Mr. Foerster didn't, but Mr. Cobb, an associate and member of the firm, did discuss the terms with my mother.

Q. Were you present?

A. I was present at the time.

Q. Was the trust that was formed early in March 1928 the result of that discussion?

A. That was the result of it, after numerous conferences.

Q. At that time was there anything said by the attorneys as to whether or not the trust as it was prepared would be subject to Federal estate tax?

A. Yes, he did discuss that subject.

Q. What was said about it?

A. He said it would not be subject to Federal estate tax.

(Testimony of Sydney M. Higgins.)

Q. Was that the purpose of making the trust, to avoid the Federal estate tax?

Mr. Melville: I object to that, your Honor. That calls for a conclusion of this witness as to what was in somebody's mind—somebody else's mind.

The Court: You are asking as to whether the mother said that was the purpose, is that right?

Mr. Stone: No, I think I did ask him what was the purpose.

Mr. Melville: Will the reporter read the question?

(The question was read.)

The Court: This witness did not make the trust.

Mr. Stone: No. Was that your mother's purpose in making the trust?

Mr. Melville: I object to that, your Honor; calls for a conclusion of the witness as to somebody else's purpose, and that, your Honor, is exactly what you are going to have to decide.

The Court: Overruled.

Q. (By Mr. Stone): What is your answer?

A. It was not made for that.

Q. What was the purpose of her making the trust?

A. Just the reason that I went down to San Diego, to get rid of this man, to get her property in such a condition that he could not—not only that he could not touch it but that she could not, that she could not have access to a cent's worth of her property. That was the sole purpose of this trust.

(Testimony of Sydney M. Higgins.)

Q. Was there a question of Harrow's divorce from your mother entered into at that same time?

A. Not at that time, only it was anticipated. It was [24] an anticipated action.

Q. And was there any money paid to Harrow at that same time?

A. There was \$5,000.00 paid to him.

Q. For what reason?

A. When he married my mother he gave up his job in San Diego, thereby being incapable of supporting her, and we felt that if this trust was made and he should not get hold of any of her property, that he would undoubtedly go into court and get a divorce, and at the same time ask the court for a monetary settlement, inasmuch as he had given up his job. We thought that by offering him \$5,000.00 that he would accept it, we would forever remove any contingency, and he did accept it and was paid.

Q. Did you know when he was paid the \$5,000.00?

A. He was paid within a few days after the trust was made, as I recall it. Mr. Cobb told me in a conference that he had offered him money and he had accepted the check and he was paid cash.

Q. What was your mother's mental and physical condition at the time the trust was made and immediately preceding that?

A. Well, it was perfectly clear in every way. She discussed the minutest questions with me, and all that. The only reason she didn't want to sign

(Testimony of Sydney M. Higgins.)

the trust was that she [25] was going to lose control of her property and she always was a very good business woman and she didn't like the picture, but she felt that was the only way she could get free of this man.

Q. Was she ill?

A. No, she was in a nervous condition. She was not ill. She was able to manage all of that, she seemed, and she discussed perfectly plainly.

Q. Did she make any remark about expecting death or being near to death?

A. None whatsoever.

Q. Was she at that time in any condition that you could see that might be near death?

A. No, none whatsoever.

Q. Was there any discussion of making that trust in a line of testamentary disposition?

A. Her immediate death or any time near was not anticipated, except that we all expect to die some day, and any trust anticipates the death of the maker is possible at some time in the future, but not at that time, no, and I think one proof of that is that the day after my mother signed the trust I went back. I wouldn't leave my mother in the condition bordering on death, most certainly.

Q. Then at the time you left she was not seriously ill? [26] A. No, she was not.

Q. I understand she was not physically ill at all?

A. I beg your pardon.

Mr. Stone: Read the question, please.

(The question was read.)

(Testimony of Sydney M. Higgins.)

The Witness: No, not a bit. She walked down-stairs the morning that she was hit with the keys, she walked down from the second floor out into the garden and sat down in a chair.

Q. (By Mr. Stone): Did you ever see any letter from any relative of Mr. Harrow's concerning his getting hold of the Higgins' property?

A. I did.

Q. Where did you see it?

A. In the Clift Hotel in San Francisco, California.

Q. Where was the letter?

A. The letter was under a desk blotter there, a large blotter.

Q. Did your mother see it?

A. My mother found it.

Q. And showed it to you?

A. And she showed it to me.

Q. Do you have the letter?

A. No, I haven't the letter, because it didn't belong [27] to her and didn't belong to me.

Q. When was that?

A. Oh, that was about 1927, sometime in there.

Q. Who was it from?

A. It was from his daughter in Boston, Massachusetts.

Q. To whom? A. To Mr. Samuel Harrow.

Q. Do you know what it said in regard to getting her property?

Mr. Melville: Your Honor, I think this has gone

(Testimony of Sydney M. Higgins.)

far enough. I object to this as being entirely hearsay and not the best evidence.

The Court: Well, what do you say about his accounting for the original?

Mr. Melville: He says he doesn't have it.

The Witness: No, but I read it.

The Court: I think you will have to go into that further, to show what effort was made to get it.

Q. (By Mr. Stone): Do you know what became of the letter? A. No, I don't.

Q. Have you searched for it?

A. No. It was not my mother's property and it was not mine, so she put it back where she found it.

Q. And left it there? [28]

A. And left it there.

Q. Was it in her belongings at the time of her death? A. It was not.

Q. You are executor of her estate?

A. None that I found.

Mr. Stone: I renew the question.

The Court: Just a minute. Whose property was it? I will ask you. You can ask the witness if you don't know.

Mr. Stone: You mean the letter?

The Court: Yes.

Q. (By Mr. Stone): Whose property was the letter?

A. The property of Mr. Harrow and it was addressed to him.

(Testimony of Sydney M. Higgins.)

The Court: Where is Mr. Harrow now?

Q. (By Mr. Stone): Do you know where Mr. Harrow is?

A. At the present time I would say he is in San Diego. I don't know. I haven't seen him since 1928.

The Court: I will sustain the objection. You made no effort to subpoena the letter?

Mr. Stone: You may cross-examine.

The Court: We will take a recess until 2:00 o'clock.

Mr. Stone: Just a minute, your Honor, just one more question.

Q. (By Mr. Stone): Did you receive any income from the trust? A. I did.

Q. \$75.00 a month as provided?

A. \$75.00 a month.

Q. And your sister received the same?

A. I understand so.

Q. Have you ever received any principal of the corpus of the trust? A. Not a penny.

Mr. Stone: That is all the questions I have.

The Court: We will take a recess until 2:00 o'clock.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. of the same day.) [30]

Afternoon Session

The Court: Proceed with the case on hearing,
Estate of Dell Hinds Higgins.

Mr. Melville: Will the witness resume the stand
for cross-examination?

Whereupon,

SYDNEY M. HIGGINS

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Melville:

Q. Mr. Higgins, the parties have stipulated that your father died in 1913. Where were you living at that time? A. At Los Angeles.

Q. When did you cease living, or did you ever live, in San Diego?

A. Yes, I lived in San Diego. I was born in San Diego.

Q. When you were living in Los Angeles at the time of your father's death, were you living with your parents? A. Yes, I was.

Q. When did you leave your mother and start living elsewhere?

A. In 1914, about the fall of 1914. [31]

Q. Is that when you moved to the northern part of the state, up north of San Francisco?

(Testimony of Sydney M. Higgins.)

A. No, my mother came down to San Diego and I stayed at San Francisco.

Q. How often did you see your mother from them on? A. Quite frequently.

Q. Well, would you say twice a year?

A. Oh, sometimes more than that, sometimes about twice a year. Sometimes she came up north, usually about once a year, and sometimes twice a year, and I used to come down and see her.

Q. Do you know when your mother first met Mr. Harrow?

A. No, I was in the Navy in the First World War, and after the Armistice I was on a destroyer and came back here in September, I think September of 1919, and that was the first time that I met him.

Q. You met Mr. Harrow at that time?

A. At San Diego, the destroyer I was aboard put in at San Diego and I met him at that time for the first time.

Q. Did you meet him through your mother?

A. I beg your pardon?

Q. Did you meet Mr. Harrow through your mother?

A. Yes, I did; through my mother.

Q. How long had she know him then, do you know?

A. I haven't any idea. That would only be hearsay on [32] my part.

Q. Well, we have had a lot of that. Did your

(Testimony of Sydney M. Higgins.)

mother ever write and tell you how long she had known him?

A. Yes, I believe, but I have forgotten. It must have been a few months before I got back.

Q. Did Mr. Harrow live in San Diego?

A. He lived in San Diego and worked in San Diego.

Q. What kind of work did he do?

A. He was with a jewelry firm in San Diego.

Q. Was it Jessop's? A. Jessop.

Q. What kind of work did he do?

A. I don't know.

Q. Well, was he a salesman or engraver or what?

A. I don't know. I never went into it, asked him about his work.

Q. Did your mother never tell you?

A. No. I wasn't curious about what he did.

Q. As far as you know, did he continue working at Jessop's? A. When?

Q. Well, do you know if he ever ceased working at Jessop's?

A. When he married my mother, he ceased working.

Q. When he married your mother, he ceased working at [33] Jessop's? A. Yes.

Q. Was that one of the stipulations to the marriage, that he cease working?

A. That I don't know.

Q. Your mother didn't confide in you to that extent?

(Testimony of Sydney M. Higgins.)

A. No, I don't think she would confide in me that way. I think she wanted companionship, and as I understood it, she didn't want him to work. She would rather have him around.

Q. During all this time from 1918 or 1919, when she first met Mr. Harrow, to the time when they were married in 1925, you were seeing your mother twice a year or thereabouts? A. Yes, I was.

Q. Would you come down to San Diego or would she come up to where you were living?

A. Both.

Q. Did you correspond with her very frequently at that time?

A. Yes, very frequently. Sometimes twice a week, sometimes only once a week.

Q. Did she confide in you that she was contemplating marriage? A. She did. [34]

Q. What was your reaction?

A. My personal reaction was extreme antagonism towards him. That was none of my business whom my mother married. I didn't think I should step in, because it would only make things all the worse, so I said nothing, although I didn't like the man, I never liked him. I never had any use for him. That is why I didn't see him.

Q. Did your mother consult you about the advisability of marriage, or anything else?

A. Yes, she did. She asked me whether she should marry him or not. I said she was my mother and certainly an adult and capable of making up

(Testimony of Sydney M. Higgins.)

her own mind, and it was up to her. If it was for her happiness, all right, it was up to her, not to me, to say.

Q. How old was Mr. Harrow at the time of the marriage, let us say in 1925?

A. Well, I understood he was 64 or 65, somewhere around there.

Q. Had your mother prior to her death been seriously ill at any time?

A. No, not particularly, not that I know. When I was a small boy she had pneumonia. That is the only time that I really knew that she was really ill. I think that was the first year I went to high school, just entering high school.

Q. Well, during the time—let's begin with the end [35] of the last war, 1918 or 1919; did your mother enter hospitals or sanitariums on occasions?

A. She went to the Paradise Valley Sanitarium.

Q. Is that the only one?

A. No, she went to, I believe it was sort of a rest home or something up in Pasadena, I believe it was.

Q. What was the purpose of her going to the rest home in Pasadena?

A. Well, I wanted her to live with me and she wouldn't do it, she said she would not live with any member of her family, and she didn't want to live in a hotel all alone, and there wasn't very much else she could do.

Q. Was she so old and feeble that she could not keep an apartment or small house?

(Testimony of Sydney M. Higgins.)

A. Yes, about in 1918, somewhere around there, she fell in the bathtub and threw her hip out. She was unable to walk very well. She had—I know when she lived in San Diego she had to have an apartment on the ground floor, because she couldn't get up and down stairs that way.

Q. So far as you know did she ever enter a hospital from 1918 forward?

A. She never entered a hospital. Paradise Valley Sanitarium, that is the only one she was in.

Q. You say she was not seriously ill?

A. No, she was never seriously ill. [36]

Q. What was the reason that she entered the sanitarium?

A. So she could get away from Mr. Harrow.

Q. Is that the only reason?

A. Yes, that was the only reason that I know of. She had become quite nervous through his—

Q. She really didn't need a nurse, then, did she, if all she was doing was getting away from her husband?

A. Well, she had quite a nervous time as the result of his hounding her all the time for money, so she went to the Paradise Valley Sanitarium.

Q. Well, did she have a nurse?

A. I suppose she did. I don't know.

Q. Don't you know?

A. Probably not, not all the time probably, just had an ordinary sort of nurse. She was not in bed.

Q. Do you know when she entered the sanitarium at National City?

(Testimony of Sydney M. Higgins.)

A. No, I have forgotten that.

Q. What? A. I don't recall that.

Q. She was there for several months, wasn't she?

A. Yes, she was there for several months.

Q. She was there for several months prior to the execution of this trust instrument, wasn't she? [37]

A. Yes, she was. If she had been really ill, I would have gone down to see her and take care of her.

Q. During the time subsequent to the execution of this trust agreement, now, or this trust document, the stipulated fact is that on numerous occasions your mother went to the court through counsel and asked for increased payments. Did you join her in those applications to the court?

A. I did, but they were not numerous. There were just two occasions.

Q. Well, in any ones that she filed, which are stipulated facts, you joined her, is that correct?

A. I did.

Q. How was that handled? Did you come down to San Diego or were the documents sent up to you for signature?

A. As I recall it, they were sent up to me and I had to go to a notary.

Q. Did you ever ask for an increased payment to yourself? A. Never.

Q. You were getting \$75.00 a month, I believe?

A. I was.

(Testimony of Sydney M. Higgins.)

Q. Did you need that money?

A. Did I need it?

Q. Yes. [38]

A. I wouldn't have accepted it if I hadn't needed it.

Q. Your income at that time then was such that you really needed that \$75.00 a month?

A. Yes, that was one reason.

Q. What was the other?

A. The other was that part of that money really belonged to my father, and on my father's death my sister and I did not claim it, and the reason that we really got the \$75.00 a month was, it was knowledge of my mother of that fact. In other words, we were really interested in it ourselves, and we wanted her to have it all, and we never made any claim. He died without any will, so she said that that in a measure belonged to us and she wanted us to participate in the income. Neither my sister nor myself asked my mother for the \$75.00 a month. It was voluntarily given by her.

Q. So that, to answer my question, as I understand your testimony now, it is that you accepted and received the \$75.00 first because you needed it, and second because, in fact, it was payment to you and your sister of what rightfully belonged to you out of your father's estate, is that it?

A. Yes. I had been quite ill myself, and that is why I needed the money.

Q. Did your mother ever write and tell you that she [39] was afraid of her husband, Mr. Harrow?

(Testimony of Sydney M. Higgins.)

A. She was afraid of him, yes, many times she did.

Q. Just what was she afraid of?

A. Well, for instance, he would take her past cemeteries, take her past hospitals, and he would say, "See, that is where I am going to put you. I am going to cause your death." It might seem fantastic, but that is exactly what he told her time and time again.

Q. Was she afraid that he might kill her?

A. I don't know. She never expressed any sort of a sentiment of that sort to me.

Q. Was she afraid of bodily injury?

A. No, I don't believe so.

Q. I didn't hear that.

A. I don't believe so. He was working on her purely in a mental capacity, not physically.

Q. Well, what about this mental condition of your mother. Was there ever any question of her standing, being able to stand up under this?

A. Well, that was—it was a continuous wearing process upon his part and naturally she resented it, and he worked on her all the time, so she just wanted to get away from him, and the only way she could get away from him was to go to the sanitarium or some place like that, seeing that she would not come to my home. [40]

Q. Was she ever treated by a psychiatrist?

A. Heavens no. There was no mental thing of that sort involved in the least. She was as sane to the date she died as anybody ever was.

(Testimony of Sydney M. Higgins.)

Q. I believe your testimony this morning was to the effect that on one occasion, at least, when your mother was in this sanitarium, she was able to walk downstairs and out to the garden. Was that something unusual, for your mother to be able to walk?

A. No, she could—she was on the second floor, as I recall it. She went from the second floor to the first floor by an elevator, and then there were a few steps down to the garden. As I stated before, she had thrown her hip out and it was extremely difficult for her to walk.

Q. Mr. Higgins, there had been quite a bit of testimony about efforts on Mr. Harrow's part in trying to drive your mother instance, and so I ask the question, whether there was ever any question about her ability to withstand these efforts on his part?

A. No, I don't think there was any question of her ability to do that if she wished to subject herself to that sort of thing. She did not wish to subject herself. It was a continuous process on his part. He did it all of the time.

Q. You got this, of course, through your mother?

A. That is what she told me, yes.

Q. Did she talk about it most every time you would see her? A. Oh, usually.

Q. Did you ever try to verify whether it was fact or whether it was just a product of her imagination?

(Testimony of Sydney M. Higgins.)

A. No, I did verify it. I verified it with the medical staff at Paradise Sanitarium.

Q. What did you find out?

A. That she was telling the truth and she was not having any hallucinations at all. It was a fact.

Q. Do you remember the day on which the doctor called you from the sanitarium, that is, the day of the month?

A. No. I think it was in March.

Q. 1928? A. March of 1928.

Q. Do you know the day of the month?

A. No, it was the day before, naturally, that I arrived down here. I got down the next day, on that same day that I met Mr. Foerster, and I told him about the—

Q. Met him in San Diego?

A. It started after I had been in San Diego.

Q. We know the trust agreement was executed the 28th of March, so that if you can figure out how many days it was from the time you arrived down there to the date the [42] instrument was executed, we can probably get the approximate date.

A. It took about two days to—after I had been there about three days, it took about two days to draw up the rough draft.

Q. You never saw Harrow after you arrived down there on that occasion, did you?

A. Yes, I saw him once.

Q. You did?

A. He saw me first and he ran.

(Testimony of Sydney M. Higgins.)

Q. When was this?

A. I was sitting in there with the manager of the trust department of the then bank, the San Diego National Bank, and in his office, and he turned to me and he said, "I want you to look around. There is something very funny happening at the door." And then Harrow came in the door and saw me and he nearly broke his leg and arm getting out of the place before I could see him. Then I turned around and I saw him, and I never saw him after that.

Q. At that time Mr. Harrow and your mother were separated, weren't they?

A. She was in the sanitarium and he was—I don't know, he was living in an apartment house.

Q. And had ceased seeing her, they had reached the parting of their marital bonds and were expecting to obtain [43] a divorce, isn't that right?

A. No, he used to go out to see her.

Q. But he didn't come to see her after your arrived down there, did he? A. No.

Q. He did stop seeing her at the time you arrived down there?

A. The day he hit her with a key was the last time he saw her.

Q. Do you know what date that was?

A. It was the day before I got down there.

Q. Did you ever execute an affidavit in connection with this case?

A. I didn't hear the question.

(Testimony of Sydney M. Higgins.)

Q. Did you ever execute an affidavit in connection with this case?

A. An affidavit? I don't know what it would be about.

Mr. Melville: I ask that this be marked for identification Respondent's Exhibit O.

(The document above-referred to was marked Respondent's Exhibit O for identification.)

Q. (By Mr. Melville): I show you a document which has been marked for identification as Respondent's Exhibit O, and call your [44] attention to the very last page and ask you if that is your signature? A. It is.

Q. Is this the signature of your attorney, Mr. Stone? A. Yes, I would say it is.

Q. Do you recall executing this document?

A. It was probably in connection with a request for additional income, wasn't it, to my mother?

Q. That was executed on the 23rd day of April, 1946, according to your notarial—

A. Oh, yes. After her death.

Q. Yes. A. Yes.

Q. Who prepared this document?

A. Mr. Stone prepared it.

Q. Do you know where he got the information that he put into it? Do you know where he got the information that he incorporated in this affidavit?

A. No, I haven't any idea.

(Testimony of Sydney M. Higgins.)

Q. Did he get it from you?

A. Well, I haven't read it through, so I am not prepared to answer that question right offhand.

Q. Didn't you read it at the time you signed it?

A. Naturally, I don't sign documents without reading [45] them.

Q. I am glad you said that. Was everything in this document true?

A. Well, if I said it was, it apparently is. I made an affidavit. I have not read the document again.

Q. I will lay it before you and you can read it. I am going to call your attention to a few paragraphs in it and ask you questions about them. In that second paragraph, Mr. Higgins, you stated that Mr. Harrow was using unbelievably fantastic and melodramatic means to try to drive her insane. Would you mind telling us what those fantastic and melodramatic means were?

A. Well, I have already told you he drove her past cemeteries and past hospitals and said, "That is where I am going to put you; that is where you are going to land; that is where you are going to be."

Q. Did he say how he was going to put her there? A. Did he what?

Q. Did he say how he was going to put her there?

A. No, he never made that explanation, how he was going to put her there or why.

(Testimony of Sydney M. Higgins.)

Q. The next thing, even going so far as to demand from her while lying seriously ill in the hospital—I think you said awhile ago that she was never seriously ill.

A. I said she was in a very highly nervous state, so I [46] would say that was ill.

Q. Now, was she or wasn't she seriously ill?

A. His reaction toward her and hitting her in the face would certainly cause a very serious reaction in every way about that, and I would say the day after he hit her she was ill, yes.

Q. Seriously ill?

A. No doubt about it. She was ill.

Q. Seriously ill?

A. I am not a doctor. I don't know.

Q. I am just trying to reconcile your testimony before with this affidavit.

A. I would say that she was ill. When I saw her, she certainly was ill, and it was due particularly to the reaction from these efforts, throwing the keys at her and hitting her in the face. Up to that time shew as confined to the—

Q. And this hospital you mentioned here, you of course meant it was a sanitarium?

A. Yes, sir, it was the Paradise Valley Sanitarium. It is more a rest home, I guess that is the word. She was trying to rest from him.

Q. Calling your attention the next paragraph, the one beginning near the bottom of the page, the trustor expressed her intention to and by instruct-

(Testimony of Sydney M. Higgins.)

ing the bank and her said attorney by such declaration of trust did divest [47] herself of the property in an irrevocable trust so that the property could not be subject to Federal taxes. Tell us about the conversations that took place with respect to Federal taxes.

A. That was merely a side issue; I was told by the——

Q. I didn't ask what kind of an issue it was. I am asking for the conversation.

A. Conversation about what?

Q. Well, were you ever present when your mother made the inquiry of an attorney with respect to whether this would be subject to Federal taxes?

A. I was there, but she didn't make that inquiry.

Q. When you say you were there, where were you?

A. I was in her room at the Paradise Valley Sanitarium. I don't remember the room number.

Q. Is that the first time that she talked to the attorney about it?

A. Well, that was the first time he went out there, he went with me.

Q. The trust was in completed form?

A. It was in completed form ready for her to sign.

Q. And she never talked to the attorney before the trust was drawn up?

(Testimony of Sydney M. Higgins.)

A. No, that was the first time he had ever been out there. [48]

Q. Had she been down to see him?

A. No.

Q. So that the information that he had was what you could give, is that correct?

A. She would have no occasion to see the attorney, because this other thing happened, this had taken place already, and if it had not been for that there would not have been any occasion for his—I think the main reason for his hitting her was she refused to sign these papers divesting herself of all her property. That was one part of the thing.

Q. We will get along a little bit faster if you will just answer the questions and not get into any arguments. A. Very well.

Q. You are a beneficiary of this estate, aren't you? A. I am.

Q. All right. I am trying to go back to the conversations leading up to the execution of this trust instrument. Did you discuss with your mother the matter of executing the trust instrument before you talked to the attorney? A. Yes.

Q. And then when you went to the attorney you conveyed her wishes to him, is that correct?

A. That is correct.

Q. And then when you went out to her, the trust [49] instrument was all in final form for signature?

A. It was.

Q. Was any change made after she looked at it before she signed it? A. None at all.

(Testimony of Sydney M. Higgins.)

Q. In other words, the attorney, through your instructions, was able to comply exactly with her wishes in the matter at the first attempt?

A. Entirely.

Q. With whom, then, did she—first, did she tell you anything about her desires in connection with estate taxes?

A. No, she didn't mention the taxes.

Q. She didn't? A. Not at any time.

Q. Did you when you talked to the attorney about the trust mention taxes?

A. No, he just happened to mention after it was drawn up, he said, "This can be a saving in Federal taxes," but that was not the reason that it was drawn up.

Q. I call your attention now to this paragraph: "The trustor expressed her intention of and by instructing the bank and her said attorney by said declaration of trust did divest herself of the property in an irrevocable trust so that the property could not be subject to Federal taxes." [50] Now, to whom did she express her intention so that the property could not be subject to Federal taxes?

A. She didn't express her intention in that regard.

Q. So that your affidavit in that regard is false, is that right?

A. He said that it was originally made—

Q. I am asking you, your affidavit is either true or false, which is it?

(Testimony of Sydney M. Higgins.)

Mr. Stone: We object. That is argumentative. The instrument speaks for itself.

Mr. Melville: I think the Court is entitled to know whether it is a true statement or whether it is not.

The Court: Overruled.

By Mr. Melville:

Q. Answer the question. Is that statement in the affidavit true or false? A. Partially true.

Q. And partially false?

A. No, I wouldn't say it was partially false.

Q. It is either true or false, isn't it?

A. She did not make that trust to avoid Federal taxes.

Q. I didn't say that. I want to know if your statement in that affidavit which you at one time swore was true, is true? [51]

A. Well, she did not make that to avoid the payment of Federal taxes.

Q. I didn't ask that. I asked you if your statement in that affidavit is true or false?

A. I said it is partially.

Q. Partially what? It is false, isn't it?

A. No, I wouldn't say so.

Q. It is partially false, isn't it? Isn't it? Isn't it? A. Partially false?

Q. Yes. A. Well, possibly it is.

Q. It is, isn't it, false in part?

A. In part?

Q. In part, yes. Was it in part?

(Testimony of Sydney M. Higgins.)

A. Yes. It was not made with that intention at all.

Q. I want you to tell this Court whether that statement is true or false.

Mr. Stone: Again I object to this examination as being argumentative and incompetent. This statement shows plainly he is alleging matters of belief, and so forth. It does not refer to an irrevocable trust. It is clear on its face and it is unfair to attempt to force the witness to say something that has been answered time and time again.

The Court: I think this witness can take care of [52] himself. Overruled.

By Mr. Melville:

Q. Mr. Higgins, I just want to know what the facts are in this case, and if you have made an erroneous false affidavit before, I think it ought to come out. If you have not made a false affidavit before, I think you ought to testify to the same effect today. We are looking at the same paragraph, aren't we? A. Yes, right here.

Q. And that first sentence in that paragraph, "Trustor expressed her intention to and by instructing the bank and her said attorney by said declaration of trust did divest herself of the property in an irrevocable trust so that the property could not be subject to Federal Taxes." Now, you made that statement in an affidavit which you executed before a notary public in April, 1946. Were you telling the truth then?

(Testimony of Sydney M. Higgins.)

A. Well, that was an erroneous—

Q. Just answer that question yes or no. Were you telling the truth then when you made that statement in your affidavit? You can answer that yes or no, and you can explain later. Were you telling the truth then?

A. I probably didn't read that correctly.

Mr. Melville: Your Honor, may I ask that the Court instruct the witness to answer my question yes or no [53] without qualification?

The Court: I won't instruct him to answer yes or no, but I will instruct him to answer the question.

Do you understand the question?

The Witness: Yes, your Honor, I understand the question, but it would appear that he is trying to incriminate me in some way when that was not so.

The Court: Now, you can answer that question, can't you, whether that statement was true or false at the time it was made?

The Witness: She didn't make it that way to avoid taxes.

The Court: Well, you said she did. Was that statement true or false?

The Witness: If I said she didn't, now, it was not correct, I will admit, yes.

By Mr. Melville:

Q. This affidavit then is not true, this sentence which I just read, then, is false, is that correct?

A. Yes.

(Testimony of Sydney M. Higgins.)

Q. Now, Mr. Higgins, would you mind telling the Court why you made a false statement in your affidavit?

A. Well, as I say, that is probably one of those times when I signed something and didn't read it.

Q. You didn't read this one? [54]

A. I didn't read it as carefully as I should, because she did not make that—I am under oath to tell the truth, and I am telling you the truth, and she did not make that trust for that reason. It was made for the sole purpose of getting her property beyond the reach of Harrow, and this tax came as only the aftermath, it was only mentioned to her, it was mentioned by the attorney to her and also the manager of the trust department of the Bank of Italy. He said, as I recall, he said, "You know that she no longer owns the property, she can't control it, has nothing to say about it at all, it is not hers but the property of the bank; she has conveyed it to the bank, and whether you know it or not, it so happens that it is not subject to Federal tax."

Now, that is the absolute truth of the whole thing.

Q. Mr. Higgins, do you know the purpose for which this affidavit was executed by you?

A. No, I don't know.

Q. You are the executor of the—

A. I was the administrator.

Q. —administrator of the estate?

A. Yes.

Q. Do you know that a tax controversy was

(Testimony of Sydney M. Higgins.)

pending with the Federal Government at the time that you executed this affidavit?

A. I heard that there was some difficulty or some [55] claim of the Federal Government.

Q. But you didn't know that this affidavit was being executed to present to the Federal Government in connection with that?

A. I knew it had something to do with that, probably.

Q. Where were you when you executed this?

A. I was up in San Anselmo.

Q. You were where?

A. I think I was in San Anselmo.

Q. Was Mr. Stone up there at that time?

A. Was I what?

Q. Was Mr. Stone up there at that time?

A. I would like to withdraw that. I must have been down in—I must have been in San Diego.

Q. Were you in Mr. Stone's office when you executed this?

A. I absolutely don't—now, I don't recall. There were so many of these things going on all the time that I had to sign, and I had to make numerous trips back and forth. I don't recall whether I was in Stone's office or whether he sent it up north.

Q. Well, the notarial statement at the bottom says, "Subscribed and sworn to before me," and is signed by Mr. Stone.

A. I think it was in San Diego. I think, as I

(Testimony of Sydney M. Higgins.)

recall [56] it, we went to a notary in the same building in which Mr. Stone's office is located.

Q. Wasn't Mr. Stone the notary?

A. Was he what?

Q. Wasn't Mr. Stone the notary himself? Before whom you executed this document?

A. I don't know. I remember one time——

Q. Look at it. You have got it before you.

A. All right. He is the notary, then, if that is what it says.

Q. In other words, you swore to this before Mr. Stone as the notary public?

A. Yes, if he is the notary public, I did.

Q. He is your attorney for the estate, isn't he?

A. Yes.

Q. And you want this Court to get the impression that you didn't know why you were executing this affidavit? A. No, not at all.

Q. All right; then tell the Court why you executed the affidavit.

A. He explained to me, as I recall, that it had something to do with the tax controversy, probably.

Q. Probably? A. Yes. I don't know.

Q. Could it have anything to do with anything else in [57] the world?

A. Well, it might have been with the accounting for the state or somebody. I don't know.

Q. You just got through saying that you were not sure why this affidavit was executed.

A. No, I am not positive.

(Testimony of Sydney M. Higgins.)

Q. Let me call your attention to the last paragraph, which says: "This affidavit is a true statement of facts I will testify to if called as a witness in the matter of the assessment of Federal estate tax on the March 24, 1938, trust of Dell Hinds Higgins."

A. Yes.

Q. Now, did you have that idea at that time you signed the affidavit?

A. No.

Q. Why are you changing your testimony, then?

A. Because I hadn't read the last paragraph until you called it to my attention.

Q. Why did you make the false statement in the third paragraph of the first page?

Mr. Stone: I object to that as an improper question, the same one we have been——

The Court: Overruled. This witness has admitted that it is a false statement.

Mr. Stone: I can't agree to that. He has admitted what counsel has said was the meaning of that [58] sentence was a false statement, but that is not what the sentence says. It says it was an irrevocable trust so that the property could not be subject to Federal tax. It doesn't say that she told him to make it so it would not be subject to Federal tax.

The Court: You may ask this witness when he read that affidavit after you prepared it whether he was aware of the very careful distinction that you are drawing now between one thing and another. This witness got the same impression from that, undoubtedly, when he said that as he put it

(Testimony of Sydney M. Higgins.)

when he read it that the statement meant to him that she was making this trust in order to avoid Federal estate taxes. He says now she did not make the trust for that purpose, and therefore the statement in this affidavit is incorrect. Now, he has already said that, and so when counsel says, "Why did you make that incorrect statement?", I don't see that he is drawing any conclusion. That is certainly what he testified to. Overruled.

Mr. Stone: It seems to me if the Court would read that himself and have it in front of him he would have the same conclusion that Mr. Higgins had at the time.

Mr. Melville: I am not trying to keep anything from your knowledge, and I ask the Court to read this third paragraph:

The Court: It is not for me to say. It is Mr. [59] Higgins' testimony which is being taken, and it is up to him to read this paper. I will take a recess now and give him ten minutes to read the affidavit to be sure he understands it.

Mr. Melville: I don't want him to read it with his counsel. I propose if we are going to take a recess and the judge retire to his chambers, that the witness stay on the stand. I don't want him to confer with his counsel.

The Court: I think that is a reasonable suggestion. Do you want some time to reread that affidavit, Mr. Higgins?

The Witness: I can read it, your Honor, in just a minute here. I won't have to take your time.

(Testimony of Sydney M. Higgins.)

Mr. Melville: As a matter of fact, I read every paragraph to him.

The Court: I don't want any implication here that this witness is being taken advantage of, or anything like that, so if there is any doubt of his understanding, I want him to have all the time necessary. If you want a minute, you can have a minute, and if you want ten minutes, you can have ten minutes.

Mr. Reporter, you will let the record show that we pause while the witness is rereading the affidavit.

The Witness: I believe I understand the substance of it, your Honor. [60]

The Court: Very well. Proceed, please.

Mr. Melville: May the reporter read the last question, please?

(The question was read.)

The Witness: Why did I make it?

By Mr. Melville:

Q. Yes, why did you make that false statement?

A. I haven't the faintest idea. Whatever it is, it was purely unintentional.

Q. Why did you say in the very last paragraph of the affidavit that if called as a witness that you would testify to these statements, and now you are testifying to the contrary? What has transpired between the time that you executed this affidavit in April of 1946 and the present time to cause you to change your testimony? A. Why, nothing.

Q. Then why, when you said in your affidavit

(Testimony of Sydney M. Higgins.)

that you would testify according to these facts which are set forth in that affidavit, why don't you testify to them?

A. I really don't know. That trust was made for just one purpose, and I testified why it was made and I stand by my testimony through anything that comes.

Q. But you won't stand by your affidavit?

A. I didn't read it carefully enough, apparently.

Q. Calling your attention to the first full paragraph [61] on the second page, which reads as follows: "That in preparation of the trust agreement there was discussed by affiant, his mother, his sister and his mother's attorney, Mr. Cobb, the making of the trust absolutely irrevocable in order that there should be no Federal estate tax charged against it, and so said attorney prepared the trust under the law then in force and advised his client that said will would not be subject to said tax."

You have read that now, have you?

A. You said what?

Q. You have read that with me, have you?

A. I have read it.

Q. I correctly read it, did I not?

A. That is correctly read.

Q. All right, let's analyze it. Do you say there was discussion by you, your mother, your sister, and your mother's attorney, Mr. Cobb? Where did that conversation take place?

A. My mother—myself, my mother and Mr. Cobb

(Testimony of Sydney M. Higgins.)

were at the hospital, that is, at the Paradise Valley Sanitarium, in her room.

Q. Wasn't your sister there?

A. I don't recall that.

Q. Well, the affidavit says that you and your mother and your sister and your mother's attorney, Mr. Cobb, had a discussion. You say that discussion took place in your [62] mother's room?

A. Yes.

Q. And that was in connection with the preparation of the trust agreement? A. Yes.

Q. Or the execution of it.

A. No, the execution of it.

Q. The paragraph says in the preparation. Which was it?

A. It was the execution. He only went out there once when it was all ready. I discussed the preparation with her.

Q. Then what does it mean here, if this discussion was in connection with the execution of it instead of the preparation of it, why did you say that you discussed the making of the trust absolutely irrevocable in order that there should be no Federal estate tax charged against it? Would not such a conversation necessarily have to precede the preparation of it?

A. Well, that was not the reason it was irrevocable. That was not why the trust was made irrevocable.

Q. Well, I want to know whether this conversa-

(Testimony of Sydney M. Higgins.)

tion that you refer to now in this paragraph took place before the trust instrument was prepared, and if the attorney pursuant to this discussion prepared it in accordance with the [63] discussion.

A. I think he was only out there once. I think he was only out there once.

Q. Are you sure of that?

A. Not absolutely positive. I don't remember now.

Q. Does this paragraph refresh your memory? This was executed over a year ago. At that time your memory presumably was just as good, if not better, than it is today. At that time you said there was a discussion which apparently preceded the execution of this instrument.

A. I discussed it with her.

Q. Was Mr. Cobb present?

A. I don't think he was. I would not swear to it.

Q. Was your sister present?

A. I don't know. I did talk it over at the time in San Diego. I told her about the terms of that, of the trust, of the proposed trust, and at that time I am positive nothing was said about Federal estate taxes, not a word.

Q. I call your attention to the next to the last line in that paragraph and the use of the word "will." What will were you talking about? It is to the effect that at that time "said attorney prepared a trust under the law then in force and advised his client that said will would not be subject to said tax."

(Testimony of Sydney M. Higgins.)

A. I don't know. Is a trust a will? I don't know. [64] I am not an attorney. I don't know.

Q. Did your attorney prepare this?

A. He signed it. He prepared it.

Q. Did your attorney prepare this, or did you prepare it?

A. I did not prepare it. I am not a lawyer. I couldn't prepare it.

Q. Do you know who prepared this affidavit?

A. No, I don't know. I am not a lawyer. I could not prepare such a thing. I would not know how to do it.

Q. But you did read this before you executed it. What did you think was meant by the word "will"? A. I didn't think about it.

Q. All right.

The Court: How much longer do you expect to be on cross examination?

Mr. Melville: I think I am almost through, your Honor.

By Mr. Melville:

Q. Somewhere in this affidavit, it is in the first paragraph on the last page, you refer to the stopping of the salary of \$70.00 per month to the trustor as a vice-president of an estate corporation. What was the estate corporation that you referred to?

A. In Seattle, Washington, there was a building that [65] was owned by my mother and her two sisters, and it was incorporated, and that was—the estate was called the Hinds Estate, Incorporated.

(Testimony of Sydney M. Higgins.)

Q. Was that a building that your mother and her sisters received from the estate of some deceased relative? A. From their mother and father.

Q. That is Mr. and Mrs. Hinds?

A. Well, originally it was Hinds, then my grandmother—I mean my grandfather died and my grandmother married a Captain Marshall, but it went originally back to the Hinds. That is my mother's maiden name.

Q. The answer to my question then, the estate corporation means that it was a corporation which the estate formed at one time to operate this building, is that correct?

A. Yes, that was what it was.

Q. Isn't it a fact, Mr. Higgins, that Mr. Harrow sued your mother for divorce?

A. He sued her for divorce.

Q. Yes; and the divorce was granted to him?

A. It was granted to him.

Q. Are you familiar with the pleadings and the grounds that he alleged?

A. Absolutely none. I have never saw the transcript or read it, or I was never told about it.

Q. What discussions were had with your mother and [66] her attorney about providing for the funeral expenses, that they should be paid out of the corpus of the trust? Do you recall anything like that?

A. When we went over all these items together, I didn't know that was one of the things that would

(Testimony of Sydney M. Higgins.)

be taken, would be paid out of the corpus of the trust.

Q. Why did he provide for it in the trust? You must have issued instructions to him to do it, didn't you?

A. No, I wouldn't know anything about things like that.

Q. Did he receive any instructions from your mother before he prepared this?

A. No, no. The only instructions which my mother gave me were to draw up this trust so that she could have all her property removed from her control so that neither she nor he could get hold of any, and all of these technicalities were put in afterwards by the attorney.

Q. You include such things as funeral expenses as one of the technicalities you are referring to?

A. Yes. I know nothing about trusts, not anything like that. I am not an attorney.

Q. Wasn't there some discussion had about whether it was advisable to provide for funeral expenses out of the corpus?

A. No, it was written here, and as I recall, he said [67] it was always done that way.

Q. Isn't it a fact, Mr. Higgins, that even before the execution of this trust your mother had the bank instructed to not handle any of her accounts except through their trust department?

A. You mean preceding this?

Q. Yes.

(Testimony of Sydney M. Higgins.)

A. Not that I know of. If she had, I never heard about it. Incidentally, her one great objection to signing this was she didn't want to give up the control of her property, because she said the only reason to circumvent Harrow was to take the most drastic possible action, and that is exactly the only reason she did this, she didn't want to give up her control of her property at all, she objected to it, but she said she knew this was the thing, no other way that would protect the property, no other way to do it, and that is why she was willing to sign it.

Q. Did her attorney tell her that she need not make the trust irrevocable and that after the divorce was granted then she would have all her property back?

A. At the time that this trust was executed, there wasn't any question of divorce.

The Court: There wasn't?

The Witness: No; that came afterward. [68]

By Mr. Melville:

Q. Your mother and Mr. Harrow were already separated, weren't they?

A. No, they were not separated.

Q. They were not?

A. No, she was living at the sanitarium and he was at an apartment house, but he was coming to see her all the time.

Q. Did you know that when he filed suit for divorce he alleged that they were separated?

A. No, I never even knew that at all. I never

(Testimony of Sydney M. Higgins.)

was told anything about it and I knew nothing whatsoever about the divorce.

Q. Did your mother ever confide in you to the extent of telling you what steps she took to keep Mr. Harrow from getting her money?

A. No, she asked me what could be done when I came down there.

Q. I mean, before you came down?

A. No, never did. She said he was trying to get her money from her all the time, but she didn't know what to do to prevent it.

The Court: We will take a ten-minute recess.

(Short recess taken.)

The Court: Proceed. [69]

By Mr. Melville:

Q. Mr. Higgins, I believe you have already testified you were one of the principal beneficiaries of your mother's estate? A. Only as to income.

Q. Only as to income?

A. Yes. I don't get any of the property when I am alive. I don't inherit any of the corpus while I am alive.

Q. You don't? A. Only the income.

Q. Who does inherit the corpus from this estate?

A. My share goes to my three children.

Q. To your three children, so that your three children are the ones that will benefit from any tax saving in this case, is that correct?

A. Well, wouldn't they have to pay the tax any-

(Testimony of Sydney M. Higgins.)

way? Of course, I am asking you the question now. As I interpret it, they have to pay the tax.

Q. Your children you mean?

A. My children, because I don't have the property.

Mr. Melville: The respondent offers in evidence the affidavit of Mr. Higgins which has previously been marked for identification as Exhibit O. Any objection?

Mr. Stone: No.

The Court: It will be received and marked in [70] evidence.

(The document heretofore marked Respondent's Exhibit O was received in evidence.)

Mr. Melville: No more questions.

Redirect Examination

By Mr. Stone:

Q. I have just two questions. During the discussion between you and your mother and your attorney at various times in March 1928, did you discuss the question of the trust with your sister at all?

A. Discuss—

Q. The question of making the trust, did you discuss that with your sister?

A. I don't recall that. I don't think she was down there. I don't know.

Q. Did you write to her or telephone to her or have any communication with her with regard to it?

A. Not that I recall. The time element entered into it.

(Testimony of Sydney M. Higgins.)

Q. You testified early in the afternoon that at one time your mother was in a rest home at Pasadena. Can you tell about what year that was?

A. Oh, it was three to four years before that, I think.

Q. Before what? [71]

A. Before this, before this trust was made.

Q. Was it before she was married to Harrow or after?

A. I was just trying to recall. No, I don't think she was ever in any home when she was married to Mr. Harrow. In fact, I am positive of that. She was never there, I am positive of that.

Mr. Stone: That is all.

Recross Examination

By Mr. Melville:

Q. So that at least when she went to the rest home in Pasadena, she was not doing that to get away from Mr. Harrow, is that right?

A. That had nothing to do with Mr. Harrow.

Mr. Melville: All right. No more questions.

Mr. Stone: That is all. Mrs. Kendall, please.

The Court: Just a minute. There is a part of this that I am still not clear about. Can you hear me, Mr. Higgins?

The Witness: Yes, sir; I can hear you.

The Court: You remember in referring to this affidavit, which is Respondent's Exhibit O, Mr. Melville asked you when it was that your mother was seriously ill, and I want to see if my memory is

(Testimony of Sydney M. Higgins.)

right about this. As I recall it, you said that you were referring to the occasion after she had been hit with the keys that she was in a nervous [72] condition and was in the hospital.

The Witness: Yes, sir; that was it.

The Court: Now, after that did Mr. Harrow ever see your mother?

The Witness: I don't believe so, your Honor. I don't think so because she was immediately improved.

The Court: You say here, even going so far, referring to Mr. Harrow, as to demand from her while lying seriously ill in the hospital that she convey the property to him. You mean, I suppose by that, that he demanded it from her, is that right?

The Witness: He demanded it from her.

The Court: While she was seriously ill.

The Witness: While she was at the hospital. She was in a nervous condition.

The Court: What did you mean by those words, "seriously ill"? Did you mean after she had been hit with the keys, or before?

The Witness: She had quite a severe nervous condition before that, but she was not physically sick.

The Court: I am asking you what you meant by saying that. I will ask you to look at this again and read it, by saying that when she was seriously ill in the hospital he made these demands on her.

(Testimony of Sydney M. Higgins.)

The Witness: Well, I think she was seriously ill [73] in a nervous way. It reacted on her.

Mr. Melville: I can't hear the witness.

The Court: Yes; will you speak up, please?

The Witness: Yes. I would say that she was seriously ill and I don't think it is stretching the point. She was in a highly nervous state from this man's actions.

The Court: Was that before she was hit with the keys?

The Witness: Yes, sir, it was before.

The Court: And is that what you meant in your affidavit when you were talking about her being seriously ill?

The Witness: At that time I meant that, I meant, I mean it was aggravated considerably after the time. She was well and had to go back to bed. She had been up and had been walking around and going into the garden, and all that sort of thing.

The Court: Now, Mr. Higgins, I want you to take your time to answer these questions and give me some answers that you can really stand back of. I am asking you what you meant in your affidavit when you said that she was seriously ill in the hospital. Was that before or after she was hit with the keys?

The Witness: That was before.

The Court: That was before; that it what you [74] meant?

The Witness: That is what I meant.

(Testimony of Sydney M. Higgins.)

The Court: So if you said earlier in your testimony that you meant after she was hit with the keys by saying that she was seriously ill, that was a mistake, you didn't mean that, is that right?

The Witness: Well, I meant it in this way, I can put it fully, too, your Honor——

The Court: If you will read the affidavit you will see that you say while she was seriously ill he made demands on her.

The Witness: Yes, I meant that. That was the truth. She was seriously ill.

The Court: She was seriously ill before she was hit with the keys?

The Witness: Before she was hit with the keys.

The Court: And that is what you are referring to here in this affidavit?

The Witness: In this affidavit.

The Court: How long was she seriously ill?

The Witness: That is very hard. It is a long time ago. I would say that she had been down there several months.

The Court: How long? Can you fix the date approximately? [75]

The Witness: No, your Honor, but she was in San Francisco in the fall before this in 1927.

The Court: Let me see if it will help you to get the date of this trust. The date of this trust was March 1928, is that right?

Mr. Stone: March 24, 1928.

The Court: March 24, 1928. How long before that did she go to the hospital?

(Testimony of Sydney M. Higgins.)

The Witness: She went about January, somewhere around February.

The Court: February 1928?

The Witness: As near as I can recall.

The Court: How long did she stay in the hospital?

The Witness: She stayed in there, it was only a few weeks after the trust was made that she left there. She improved very, very fast when that was made.

The Court: But at the time the trust was made she was seriously ill?

The Witness: She was; yes, sir.

The Court: And if anything, she was in an aggravated condition because of this key incident, is that right?

The Witness: Because of the key incident and the determination——

The Court: How many days before the execution of the trust instrument did that key incident take place? [76] In other words, how long did it take you to consult this lawyer and have a trust prepared for her to sign it?

The Witness: It took me one day to get down, that was one day; the second day I was there. The second day I came in town because I had to call up long distance.

The Court: Will you speak up?

The Witness: I was called up in the evening that this act had taken place that afternoon, so I

(Testimony of Sydney M. Higgins.)

started right down the next day, and then after I talked to my mother I went in town and, that is, when I ran across Mr. Foerster, the attorney, on the street, and I went to his office, and he started right in that evening, worked that evening with this lawyer drafting, and I think we spent about two days negotiating with the Bank of Italy, and to get it all in preparation, I would say about five days had elapsed.

The Court: It was done very quickly?

The Witness: Yes.

The Court: There were about five days between this key incident and the time that your mother signed the trust instrument?

The Witness: Signed the trust.

The Court: During that time would you say that she was seriously ill?

The Witness: I would, your Honor, yes.

The Court: I have no further questions. [77]

By Mr. Melville:

Q. Mr. Higgins, early in my cross examination of you I asked the question whether your mother was ever seriously ill, and do you remember what you replied? A. Yes. I said no.

Q. You said then that she was never seriously ill, is that right. A. Yes.

Q. Now, that was not the truth, was it?

A. There are degrees of seriousness.

Q. Do you remember whether I asked you the question, was your mother ever seriously ill?

(Testimony of Sydney M. Higgins.)

A. Yes, I recall your words.

Q. You recall the question. Do you remember what your answer was?

A. That she had pneumonia once, yes.

Q. Do you remember whether you testified that she was never seriously ill?

A. She was seriously ill that once, very, very, almost died with pneumonia. There are degrees of things.

Q. Let's put it this way: If in your previous testimony you testified that she was never seriously ill, if you testified to that effect, do you now testify that that testimony was wrong?

A. No, what I meant the first time was, when she had [78] pneumonia she was almost mortally ill, very, very sick woman, and this time she had been and she was seriously ill. Lots of people are seriously ill.

Mr. Melville: No more questions.

Mr. Stone: That is all; no more.

The Court: All right.

(Witness excused.)

Mr. Stone: I will call Mrs. Kendall.

Whereupon,

HELEN B. KENDALL

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Mrs. Helen B. Kendall.

Direct Examination

By Mr. Stone:

Q. How old are you, Mrs. Kendall? A. 53.

Q. You are considerably younger than your brother, Sydney? A. Yes.

Q. You are his brother?

A. I am his sister.

Q. His sister; excuse me. And the daughter of Mrs. [79] Dell Hinds Higgins? A. Yes.

Q. Where do you live? A. In Altadena.

Q. That is near Los Angeles, is it?

A. Near Pasadena.

Q. How long have you lived here in Altadena?

A. I have lived there for almost 28 years.

Q. Did you see your mother during that period?

A. Yes, I did.

Q. How frequently?

A. Many times. I used to go down to visit her. I used to go to visit her.

Q. How often?

A. Oh, maybe once in two weeks, or once a month, or something like that.

Q. Did you know anything about the trust that was made in March 1928, before it was signed on the 24th of March?

(Testimony of Helen B. Kendall.)

A. There had been a discussion of it and then when it was signed, of course, I had to sign the papers, too, because I was implicated in the trust as well as my brother.

Q. With whom did you discuss it prior to the making of the trust?

A. Well, with nobody, because I was in Altadena. It would be just my brother who would call me up or would have [80] written to me.

Q. But you did know about the trust and what was being done? A. Oh, yes, yes; I knew.

Q. And you did sign it? A. Yes, sir.

Q. It was dated the 24th of March, 1928. Had you seen your mother in the Paradise Valley Sanitarium before that time within a month or two?

A. Oh, yes; I would see her many times before.

Q. How often?

A. Maybe once in a couple of weeks, or once a month.

Q. What was her condition, mentally and physically, the last time you saw her before the trust was made?

A. She was very, very nervous from going through the—Mr. Harrow's actions, she naturally was very nervous.

Q. Did she have any physical ailment?

A. No, no real physical ailment.

Q. When was the next time you saw her after the trust was made?

A. I just wouldn't remember that, Mr. Stone.

(Testimony of Helen B. Kendall.)

Q. Do you know anything about Mr. Harrow's treatment of your mother during the time they were married?

A. Yes, because she would talk to me when I would see her and tell me, or else she would write to me. After [81] writing, of course, she was very agitated in those letters, I would come down to try to calm her.

Q. At the time the trust was made, was she seriously ill so that there was any thought in her mind of death?

Mr. Melville: Just a minute, Mrs. Witness. Unless the counsel for the petitioner can show how this witness could pry into the mind of her mother and determine what was there, I don't think she has shown her qualification to answer that question and I object to it on that ground.

The Court: You may qualify her, Mr. Stone.

Mr. Stone: Yes, I will examine her further.

By Mr. Stone:

Q. Did you ever discuss with your mother her physical condition shortly before this trust was made?

A. Yes, she said she was very nervous before the trust was made due to Mr. Harrow's actions, that is enough to make anybody nervous.

Q. Did you talk to her at all about the making of the trust? A. No, I didn't until later.

Q. What do you mean later?

A. Well, after my brother had discussed it with

(Testimony of Helen B. Kendall.)

her, then I came down and we talked it over after that.

Q. Did she make any mention of impending death on any of those occasions? [82]

A. Absolutely no, never even thought of it, none of us did.

Q. Did she look or act as if she was near death?

A. No, no, she didn't.

Q. Make any expression that she was thinking of death?

A. Not one expression. None of us ever discussed anything like that, never thought of it.

Q. Did she ever tell you why she was making the trust?

A. Yes. She said she wanted to make it to keep Mr. Harrow from getting all of her money away from her.

Q. Did she ever tell you anything that he had done looking towards getting the money away from her?

A. He would try to make her sign checks away to him.

Q. Do you know of any money being paid to Mr. Harrow at or about the time the trust was made?

A. Mr. Harrow was paid \$5,000.00 so that we could get him out of the family in a hurry.

Q. Do you know when that \$5,000.00 was paid to him?

A. Yes; it was paid on April 2nd, 1928.

Q. Where did you get that date?

(Testimony of Helen B. Kendall.)

A. Out of my mother's savings book.

Mr. Stone: Mark that for identification No. 15.

(The document above-referred to was marked Petitioner's Exhibit No. 15 for identification.)

By Mr. Stone:

Q. I show you savings book. Is that the one you referred to?

A. Yes, that is the one, Mr. Stone.

Q. In the Southern Trust & Commerce Bank of San Diego? A. San Diego, yes.

Q. Where did you get the book?

A. Mother left some trunks to me in her will, and they were amongst her private papers in the trunk.

Q. And it has been in your possession since her death, then?

A. Yes, it has been there all the time. I just found it recently.

Q. Do you know that to be her savings account book?

A. Yes, I know, because I have been in that bank with mother when I visited her. I know she went there.

Mr. Stone: I would like to offer this book in evidence as Exhibit 15.

Mr. Melville: No objection.

The Court: It will be received and marked in evidence.

(The document heretofore marked Petitioner's Exhibit No. 15 was received in evidence.)

(Testimony of Helen B. Kendall.)

Mr. Stone: I call attention to the entry on April 2nd, 1928 of withdrawal of \$5,000.00, and the entry [84] on April 2nd, 1928, of the withdrawal of \$15,000.00, and the entry of the withdrawal on April 3, 1928, of the balance of the account of \$418.51. May it be agreed that the exhibit may be withdrawn by substituting a photostatic copy? We might need it for preparation of the brief.

Mr. Melville: No objection.

The Court: That may be done.

Mr. Melville: May I suggest, your Honor, that there are just a few entries in the book that will have any materiality to our case, and we can read them in the record in about a half a minute.

The Court: Well, I would rather leave it this way.

By Mr. Stone:

Q. Do you know anything about the grounds of the divorce that was filed by Mr. Harrow against your mother?

A. Well, he said that it was all over controversial matters due to finance.

Q. Mr. Harrow? A. Mr. Harrow, yes.

Mr. Stone: May I have the complaint in divorce in the case of Harrow versus Harrow marked for identification No. 16?

Mr. Melville: No need to mark it for identification. [85]

The Court: If there isn't going to be any question about it.

(Testimony of Helen B. Kendall.)

Mr. Stone: I would offer the complaint in divorce in Harrow versus Harrow in evidence in this case.

Mr. Melville: Your Honor, I take opposing counsel's statement for the fact that this is a true copy of the complaint in divorce. There is no question about the authenticity of it. I would like to ask counsel, however, to state the purpose of his offer.

Mr. Stone: The reason is to show we have in Court here evidence of what was the reason for the differences between Mr. and Mrs. Harrow, on the part of Mrs. Harrow. This is competent to show Mr. Harrow's idea of what was the differences between them, which were settled by making the trust.

Mr. Melville: Will you stipulate that everything that Mr. Harrow says in that is true?

Mr. Stone: I know nothing about it.

Mr. Melville: Then I can't see that it has any materiality, your Honor.

Mr. Stone: This is a certified copy certified by the Clerk of the Court of the complaint on file in the Superior Court of San Diego County.

The Court: It can't do you any damage, can it, Mr. Melville? You have seen these papers, haven't you? [86]

Mr. Melville: Oh, yes.

Mr. Stone: He has a copy of it.

Mr. Melville: I would like to have that in the record for some purpose there. As a matter of fact,

(Testimony of Helen B. Kendall.)

there is something in there that I would like to have in.

The Court: Well, I should think you would be willing to let it go in.

Mr. Melville: Well, all right. I will withdraw my objection.

The Court: It will be received and marked.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 16.)

Mr. Melville: Will you stipulate with me that the statements that are therein made were made by Mr. Harrow under oath and are true?

The Court: Well, he will stipulate that they are made under oath, and I suppose it is not necessary, because they are right there.

Mr. Stone: It shows on the face of it that it is made under oath.

The Court: I am not going to ask him. If you want to persist in your objection, I am inclined to agree with you that up to now I don't see any materiality, and I will sustain it. [87]

Mr. Melville: Will opposing counsel stipulate with me that if Mr. Harrow were here he would testify to the facts alleged in his complaint?

Mr. Stone: I believe he would, but I told you that I didn't know anything about it and I was not present.

Mr. Melville: If you will so stipulate, I will withdraw my objection.

(Testimony of Helen B. Kendall.)

Mr. Stone: I will so stipulate that I believe he would, I believe he did in that case, but I don't know enough about the facts.

The Court: I would take it, it either can be taken as a fact or it cannot, and I cannot do that unless it is a stipulation of evidence.

Mr. Stone: I think the complaint speaks for itself. It is a verified complaint filed in the case and the divorce was granted in the matter.

Mr. Melville: Your Honor, what my difficulty here is—

The Court: I don't see how I can do any more than sustain your objection, which I am going to do.

Mr. Melville: I appreciate that, but your Honor, if you will let it go in without the stipulation—

The Court: He has quit, so I will have to sustain the objection.

Mr. Stone: If the Court please, the record [88] stipulation in Paragraph 3 refers to the fact of the marriage and the divorce, and this is a part of the same transaction, that the divorce was made and the money was paid the same day it was paid in the trust, part of the same transaction.

The Court: I don't see any materiality in that to the question as to whether this was a trust in contemplation of death. The facts that have been testified to here as to the relationship between the two could have been just as well so if there never had been any divorce, and certainly they could be just as well so if the divorce had been one in which

(Testimony of Helen B. Kendall.)

Mrs. Harrow had been the plaintiff, and so I don't see the materiality of that paper and I am going to sustain the objection.

Mr. Stone: If the Court please, it looks to me as though we have the evidence as to what Mrs. Higgins had in mind when she made the trust, because—

The Court: Now, if there is something in there that is relevant because Mr. Harrow says it—

Mr. Stone: That is it.

The Court: Then there is only one way to get that evidence, and that is to bring him here as a witness.

Mr. Melville: Or stipulate with me if he were here he would so testify. In that event I will withdraw my objection. [89]

The Court: Mr. Stone has already explained he won't do that.

Mr. Stone: I will then offer in evidence—I would like, if I can have that complaint then marked for identification.

The Court: Surely.

(The document heretofore received in evidence as Petitioner's Exhibit No. 16 was rejected and marked for identification Petitioner's Exhibit No. 16.)

Mr. Stone: Is it necessary to take exception to the ruling of the Court or are those granted?

The Court: I am going to leave that to you.

Mr. Stone: I would just like to have an excep-

(Testimony of Helen B. Kendall.)

tion noted. Then may I have marked for identification the commission to take depositions in the case of Harrow versus Harrow of the Witness Mary Mountain.

The Court: Are you offering that or just having it marked?

Mr. Stone: I am just having it marked. I am going to offer it. At this time I offer in evidence this commission to take deposition of the Witness Mary Mountain in the case of Samuel Harrow versus Dell Hinds Harrow, for the purpose of showing the relationship between the parties just prior to the making of the trust. [90]

Mr. Melville: Are you offering the whole deposition or just the commission to take it?

Mr. Stone: Just the certified copy showing the commission to take it.

Mr. Melville: I object to that, your Honor; the materiality has not been shown, and I believe can't be shown.

The Court: There again you are introducing this thing to show that there was such a deposition, or for proof of the facts contained in it? Isn't that inadmissible here as heresay?

Mr. Stone: Unless it is admissible as part of the same transactions that were involved. We claim that the divorce and the trust were all part of the same transaction, and this is just part of the reason for the divorce, which was also the reason for her making the trust.

(Testimony of Helen B. Kendall.)

The Court: But that still would not get around the best evidence rule.

Mr. Stone: Again, if it is a part of the transaction, referring to the stipulation, Paragraph 3, the stipulation does say that the following facts may be accepted as true, giving either party the right to introduce other evidence not inconsistent therewith.

The Court: Of course, we have had stipulated all those papers which would be in the record.

Mr. Stone: I offered that but counsel would not [91] stipulate.

The Court: Well, I will sustain the objection.

Mr. Stone: And we take an exception to the ruling, please.

(The document above-referred to was marked Petitioner's Exhibit No. 17 for identification.)

Mr. Stone: May an exception be noted to the ruling of the Court on the testimony this morning of Mr. Higgins, where I made objections to the questions of counsel and they were overruled?

The Court: All right.

Mr. Stone: I would like to have the interlocutory judgment by default in the case of Harrow versus Harrow marked for identification.

(The document above-referred to was marked Petitioner's Exhibit No. 18 for identification.)

Mr. Stone: I offer this interlocutory judgment by default in the case of Harrow versus Harrow, in this case, for the purpose of completing the

(Testimony of Helen B. Kendall.)

evidence offered by the last two exhibits, 16 and 17.

Mr. Melville: I object, your Honor. That doesn't go to prove or disprove any fact that is material to this litigation.

The Court: Now, that is a different thing. As I understand it, you don't object to that on the ground it is [92] not authentic; in other words, that it is not an exemplified copy?

Mr. Melville: We have stipulated here that Mr. Harrow sued and obtained a divorce from Mrs. Harrow, the decedent in this case. We have already stipulated that.

The Court: This is the divorce?

Mr. Melville: A copy of it.

The Court: I will overrule the objection. It will be received and marked.

(The document heretofore marked Petitioner's Exhibit No. 18 was received in evidence.)

Mr. Stone: I then offer the final judgment of divorce in the case of Harrow versus Harrow.

Mr. Melville: No objection. We have already stipulated to that.

The Court: It will be received and marked in evidence.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 19.)

Mr. Stone: I would like to offer in evidence the petition of Dell Hinds Harrow to change her name to Dell Hinds Higgins.

(Testimony of Helen B. Kendall.)

Mr. Melville: Your Honor—

Mr. Stone: A certified copy of the court record.

Mr. Melville: We are cluttering up the record with that, your Honor. We have already stipulated in the stipulation which has heretofore been filed that she did petition to change her name and did change it.

The Court: Do you object to it?

Mr. Melville: No, your Honor.

The Court: It will be received and marked in evidence.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 20.)

Mr. Stone: I offer in evidence the order of the Superior Court changing the name of Dell Hinds Harrow to Dell Hinds Higgins, dated August 30, 1929.

Mr. Melville: No objection.

The Court: It will be received and marked in evidence. Is there any reason why these documents should not have been stipulated?

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 21.)

Mr. Stone: I don't know why. We tried to get them stipulated and counsel was very nice about the things that were stipulated, but this one that I have described he refused to stipulate.

(Testimony of Helen B. Kendall.)

Mr. Melville: Your Honor—

The Court: Let's not go into that, except I want counsel to recall in the future the Court's rules require everything to be stipulated that can be. As I understand, you are not objecting to this?

Mr. Melville: No, your Honor, but I am objecting to that statement of counsel that puts me in a position where it would appear as if I were keeping all of these documents out for the reason that I refused to stipulate. The only thing I refused to stipulate was the petition of Harrow for divorce. I objected to it today and my objection was sustained. I also refused to stipulate with respect to the deposition of Mary Mountain, because I wanted the privilege of cross-examination of Mrs. Mountain, and my objection to that was sustained. I have never seen or been asked to stipulate with respect to the rest of these documents. We did, however, stipulate and the stipulation will show that Mrs. Harrow did change her name and all the rest of these things, did obtain a divorce. That has all been stipulated. This is just cumulative.

Mr. Stone: Here is counsel's file that we had along when we came to stipulate, and it contains all of these papers yet to be offered, and he refused to stipulate to it.

The Court: I am not going to go into it any further at this time, because the sole purpose of that is to save time and we are losing the time now.

Mr. Melville: Yes.

(Testimony of Helen B. Kendall.)

The Court: As I understand, you do not object to this last offer?

Mr. Melville: No, your Honor.

The Court: It will be received and marked in evidence.

The Clerk: The order was marked Petitioner's Exhibit 21.

Mr. Stone: You may cross-examine.

Cross-Examination

By Mr. Melville:

Q. How many children have you? A. One.

Q. Is that child a beneficiary of this estate?

A. After my death, yes.

Q. Did you say you did or did not have discussions with your mother, your brother and the attorney with respect to the preparation of this trust agreement?

A. After my brother and mother discussed it, my brother either telephoned or wrote to me discussing it with me, then I went down.

Q. Did you ever discuss it in the presence of the attorney, Mr. Cobb?

A. No, I wasn't there at that time.

Q. Why did you and your brother have any discussion [96] about this trust instrument? Was any of your money going into it? A. No.

Q. Why were you part in the discussion at all, do you know?

A. Because my brother and I have to be—to agree to anything that mother agreed to in the be-

(Testimony of Helen B. Kendall.)

ginning, then we both of us have to agree, the three of us had to agree to everything.

Q. Why did you and your brother have to agree to anything that your mother was to do?

A. Because that is the way mother wished it.

Q. She wished herself to be so tied down that she could not do anything except with your and your brother's permission, is that right?

A. When it came to legal matters, she wanted our advice, but particularly my brother, who is older than I am, and mother at that time had no man to rely on, so she would always talk to my brother, and my brother would never do anything without asking me if it was right.

Q. As I understand it, then, there was no legal requirement?

A. No, no real legal thing. It was just to be courteous to our mother.

Q. I don't know what you mean by that. [97]

A. Well, don't you think that it is a nice thing to ask a person's opinion about their own affairs?

Q. But you say you were being courteous to your mother?

A. Yes, if she wanted my opinion and I could give her an honest opinion.

Q. Did you say that your mother had no physical ailment?

A. No real physical ailment, just nervousness.

Q. Did she have any mental ailment?

A. No, Heavens no. She was very—

(Testimony of Helen B. Kendall.)

Q. Was she in good health or poor health?

A. At the time that my brother spoke about, of course, her health was not good from a point of nervousness.

Q. Would you say her health was very poor?

A. Can you designate health that way?

Q. I don't know, but you did in the affidavit which I am about to show you.

A. There is probably legal distinctions between nervousness—

Q. Is that your signature?

A. Yes. This said that my mother was being made very nervous, highly nervous.

Mr. Melville: I offer this.

The Witness: I don't know what you would call that, ill health or nervousness, or what you would call it.

Mr. Melville: I offer in evidence as the respondent's exhibit next in order the affidavit of Helen B. Kendall. Is there any objection?

Mr. Stone: No.

The Court: It will be received and marked in evidence.

(The document above-referred to was received in evidence and marked Respondent's Exhibit P.)

Q. (By Mr. Melville): I call your attention to the language right through here, Mrs. Kendall: "Affiant's mother, who was then aged, and in very poor health—" What do you mean by that?

(Testimony of Helen B. Kendall.)

A. She was getting older and her health was not good when she was getting older, which was very reasonable.

Q. And her health was very poor?

A. In very recent years; I mean, right within three or four years.

Q. Mrs. Kendall, do you recall the occasion for executing this affidavit?

A. No, I don't remember just the date of it.

Q. Well, the date, Mrs. Kendall, is April 30, 1946, as shown at the bottom, you appeared before Mr. Stone and swore to that.

A. This is the same time that my brother—

Q. Did you execute this affidavit in connection with the estate tax matter then pending before the Treasury Department?

A. No, I don't think I was aware of it then, definitely.

Q. All right, I will read the last paragraph: "This affidavit is a true statement of facts I will testify to if called as a witness in the matter of the determination of the Federal estate tax on the March 24, 1928, trust of Dell Hinds Higgins." Does that refresh your memory?

A. That was not done in the terms that you insinuate.

Q. Well, I will ask my question. Do you now recall why you executed this affidavit?

A. I guess, I think so.

Q. You also recall why you executed it—Isn't it a fact that you executed this affidavit to be

(Testimony of Helen B. Kendall.)

submitted to the Treasury Department to influence the estate tax result in your mother's estate?

A. It was not to influence anyone. It was not for that purpose.

Q. Did you read the affidavit before you executed it?

A. Yes, but I have made so many affidavits and signed so many papers in regard to all this that I sometimes lose track of those things.

Q. Was that affidavit, at the time that you executed it, read to you? [100] A. Yes.

Q. And were the statements contained therein true? A. Yes.

Q. And they are still true? A. Yes.

Q. "Helen B. Kendall, being first duly sworn, deposes and says that she is the daughter of Dell Hinds Higgins and sister of Sydney M. Higgins, who has made affidavit as to the facts in connection with the trust made by my said mother, March 24, 1928; that the statements of said Sydney M. Higgins in his affidavit as to the reason for making the irrevocable trust and the non-taxability thereof, are all true of her own knowledge." Do you affirm that now while you are on the witness stand?

A. Well, I think that that is what they said that was correct.

Q. The part that I read to you from your affidavit, is that true?

A. Yes, if I signed it.

Q. Well, you did sign it?

A. Yes, I did.

(Testimony of Helen B. Kendall.)

Q. Then it is true?

A. Well, it must be, if I signed it.

Q. I believe you testified that when you found this bank book of your mother's, you also found a will or wills; [101] was it one or more wills?

A. I didn't find any wills.

Q. I must have misunderstood you, but I understood when you were going through the trunk you found a will.

A. No, I didn't find any will.

Q. The \$5,000.00 that was paid to Mr. Harrow, were you in on the discussions that preceded the payment of that \$5,000.00?

A. No, because I was in Altadena.

Q. Do you know whether an agreement was obtained from him in writing with respect to that?

A. It wasn't.

Q. It was not? A. No.

Q. Was there an agreement obtained orally from him with respect to that \$5,000.00?

A. I didn't hear the first part.

Q. Was there any agreement, oral or otherwise, obtained from Mr. Harrow with respect to that \$5,000.00 payment? A. Not that I know of.

Q. Are you under the impression that the \$5,000.00 was paid to him without any agreement whatsoever?

A. Well, I know that it was discussed with him by, I imagine, Mr. Cobb, but I wouldn't be there, and I don't [102] know whether my brother was or not, but it was paid to him, I do know that.

(Testimony of Helen B. Kendall.)

Q. But you don't know whether an agreement was obtained or what the provisions of it were?

A. No, I don't think there was any. He just was given a check.

Q. I call your attention to this bank book which is in evidence as Petitioner's Exhibit 15 and to the fact that on April 2nd, 1928, \$5,000.00 was withdrawn. That is the \$5,000.00 that went to Mr. Harrow?

A. That is right, yes.

Q. On that same day, April 2nd, 1928, \$15,000.00 was withdrawn. Do you know what was done with that?

A. I think that was put in the trust.

Q. That is the money that went into the trust?

A. Yes.

Q. And that shows that together with some interest that was applied, the following day, April 3, 1928, there was a balance left in the account—the interest, incidentally, was \$101.58—and that left a balance in the account of \$418.51, and that was drawn out on April 3. Do you know what happened to that?

A. No, I don't.

Q. The account was closed out, though, on that date, wasn't it? [103]

A. I don't know, but it looks like it.

Q. Now, did your mother have any discussion with you with respect to the closing out of her bank account?

A. Well, I don't remember whether she did or not. That was a long time ago.

(Testimony of Helen B. Kendall.)

Q. Did she say anything to you about having to put her house in order?

A. Just exactly what do you mean?

Q. I mean, did she discuss with you the fact that she was now free of all worries, that she had put her money in trust and had completely disposed of her finances and her property?

A. She was very happy that it was done in a certain sense, and in another way mother hated to give up the running of her own property, but she knew it was the best thing to do to protect herself.

Q. Isn't it a fact that Mr. Harrow was separated from your mother on and after the 15th of March, and that thereafter he never saw her again?

A. I just can't answer that. I don't know.

Mr. Melville: No more questions.

The Court: Any redirect examination?

Mr. Stone: I would like to, if the Court please, renew the offer of the Exhibits 16 and 17.

The Court: Just a minute, please, Mr. Stone. Have [104] you any more questions?

Mr. Stone: I have none.

The Court: Well, I have one or two questions. I am sorry. I thought you were getting ready for redirect.

You said, I believe, that your mother was in a very nervous condition about the time that this agreement was executed?

The Witness: Yes.

The Court: How did that nervousness manifest itself?

(Testimony of Helen B. Kendall.)

The Witness: That is hard to say.

The Court: Speak up, please, so these gentlemen can hear, too.

The Witness: She just wanted us to keep her and she said she was just frantic, she needed somebody to help her out of this situation, she didn't know which way to turn, and of course, she was in tears a great deal of the time.

The Court: Excuse me. One manifestation was that she was crying a good deal of the time?

The Witness: Yes, she was.

The Court: What else do you know?

The Witness: Well, that is just about all, just nervous, you know how people are when they are nervous, they go to pieces and they cry.

The Court: They cry, and you remember some other things. Do you know anything about her other physical symptoms?

The Witness: No.

The Court: Do you know, for instance, whether she was able to eat anything?

The Witness: Of course, this upset her digestion.

The Court: It did upset her digestion?

The Witness: Yes, it did.

The Court: Were there any other things, physical things, that happened to her?

The Witness: No, I would say just nervous conditions like that.

The Court: You say nervous conditions. Her digestion, that is a physical thing.

(Testimony of Helen B. Kendall.)

The Witness: Yes, it is; that is physical.

The Court: Now, were there any other physical things?

The Witness: There wasn't anything else that I can think of, just those conditions were very aggravated.

The Court: They were aggravated?

The Witness: Yes, sure.

The Court: Was she under the care of a physician during this time?

The Witness: She was there, yes, after this episode of the keys. [106]

The Court: After the episode of the keys?

The Witness: Yes.

The Court: For how long after that?

The Witness: Well, it was just a day or two; well, maybe a month or two, something like that, and then she left the sanitarium, she was very much better after she was free of everything.

The Court: But there for about a month after the episode of the keys she was under the constant care of a physician, is that right?

The Witness: Yes, she was there about a month.

The Court: I say, during that month was she under the care of a physician?

The Witness: Yes, you always are, you know, anyway, when you are in a rest home. They always have resident physicians there.

The Court: This was in addition to that, is that right?

The Witness: Yes.

(Testimony of Helen B. Kendall.)

The Court: I have no further questions.

The Witness: On account of being—because she had a cut, of course, the physician had to attend to the cut on her face.

The Court: Well, he didn't have to attend to the cut on her face for a month, did he? [107]

The Witness: Oh, no. No, she was just recovering from her nervousness during this month, month or two, I am not certain whether it was a month or two.

The Court: I have no further questions.

The Witness: Pardon me?

The Court: I say, I have no further questions.

Mr. Stone: No further questions.

The Court: All right.

(Witness excused.)

Mr. Stone: I would like to renew the offer of the two exhibits marked for identification No. 16, being the complaint in divorce in the case of Harrow versus Harrow, and No. 17, the commission to take testimony, because of the additional reason that the divorce decrees have been entered, that is, as furnishing the basis on which the decree was entered, and also furnishing the date on which the separation was made that counsel has inquired about, and it seems to me the others here, since the decrees have been offered in evidence and received, should be admissible.

The Court: You are offering them to prove the facts stated therein, is that right? If you are offering them to prove that there was a petition, I

would accept it for that limited purpose, but it would not help you any, because it would not show that those facts are true.

Mr. Stone: I am offering them to get the facts before the Court.

The Court: You want to get the facts before the record, and there is only one way to do it, and that is to produce these people as witnesses. That is elementary, isn't it, Mr. Stone? This is just as much hearsay as if it was a letter.

Mr. Stone: Unless it is part of the same transaction, which I think it is. I think this divorce and the trust are all part of the same transaction, which makes it admissible.

The Court: I don't think you will find that would make it admissible under the rules of evidence of the Equity Courts of the District of Columbia, which is what we are guided by. Same ruling. The objection is sustained.

Mr. Stone: May my exception be noted, please? The petitioner rests.

The Court: Anything for respondent?

Mr. Melville: Yes, your Honor. Pursuant to the stipulation of the parties, I at this time offer the original of the Federal estate tax return as our joint Exhibit 1-A.

The Clerk: You have joint exhibits up to 14-N attached to the stipulation.

Mr. Melville: No, the stipulation provided that we might offer those now and I am now offering it. [109]

The Court: As 1-A?

Mr. Melville: Yes, your Honor.

The Court: I take it there is no objection?

Mr. Stone: No objection.

The Court: It will be received and marked in evidence 1-A.

(The document above-referred to was received in evidence and marked Joint Exhibit No. 1-A.)

Mr. Melville: Your Honor, for the purpose of establishing what I tried to establish by cross-examination without being able to do so satisfactorily, that Mr. Harrow and the decedent in this case were separated on or about March 15, 1928, and for that purpose only, I offer the certified copy of the complaint in divorce.

Mr. Stone: Well, I object to it going in for that purpose.

The Court: Sustained. If you gentlemen can stipulate to that, you may get it in the record that way.

Mr. Melville: Will you stipulate to that fact?

Mr. Stone: I don't know it to be a fact except as I see it in the record. No, I can't.

The Court: It is contained in a document that you objected to going in, and I want to say that Mr. Stone has the burden of proof in this case anyway. However, if you can't stipulate it and you object to it, the objection [110] is sustained. Anything further?

Mr. Melville: Respondent rests.

* * *

Filed Oct. 17, 1947, T.C.U.S. [111]

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT
AND OPINION

Opper, Judge:

This proceeding was brought for a redetermination of a deficiency in estate tax of \$29,009.69. The deficiency results from the inclusion in decedent's gross estate of the value of a trust created by decedent on March 24, 1928.

The questions presented are whether the transfer of March 24, 1928, was in contemplation of death; whether the transfer was intended to take effect in possession or enjoyment at or after death, within the meaning of Internal Revenue Code, section 811(c); and whether decedent reserved the power to alter, amend, revoke or terminate the trust, within the meaning of Internal Revenue Code, section 811(d).

The facts were presented by a stipulation of the parties, and evidence adduced at the hearing. Those facts hereinafter appearing which are not from the stipulation are otherwise found from the record.

Findings of Fact

Dell Hinds Higgins, the decedent, was born on May 31, 1869, and died March 3, 1945. At the time of her death she was a resident of the County of San Diego, California. Petitioner filed a Federal estate tax return with the collector for the sixth internal revenue collection district of California on May 15, 1945. The return so filed did not disclose a net estate.

Decedent and her two sisters had been the beneficiaries of the estate of their parents which included a building in Seattle, Washington. The estate formed a corporation called Hinds Estate, Incorporated, to operate the building, and decedent became vice-president of that corporation at a salary of \$70 per month.

In 1887 decedent married Albert Edward Higgins. They had two children, a son, Sydney M. Higgins, born March 2, 1889, and a daughter, Helen B. Higgins, born July 17, 1894. Helen was married on April 10, 1917, to Kenneth Kendall. Decedent's first husband died in 1913. Both of their children are still living. Sydney has three children, and Helen has one child.

Albert Higgins left no will at the time of his death. Both Sydney and Helen were of age at that time and never claimed any share of the estate which went in its entirety to decedent.

In about 1903 decedent almost died of pneumonia. In 1918 she fell and injured her hip, and for the remainder of her life she was not able to walk well.

In 1919 decedent met Samuel Harrow, who was employed by a jewelry firm in San Diego. Harrow was not married, and was eight or nine years older than decedent. After knowing Harrow for six years decedent married him on April 9, 1925. Decedent wanted companionship and did not want Harrow to work. After they were married he resigned his position with the jewelry firm and became financially dependent upon decedent. Thereafter, con-

troversies arose relating to money matters. Harrow plagued and harassed decedent for money and caused her to become highly nervous. She became afraid of Harrow, who would take her past cemeteries and hospitals and tell her that that was where he was going to put her. He constantly made demands upon her for money and kept her in an agitated mental condition. She had a constant fear that Harrow was going to cause her death in order to get her money.

A few months before March 24, 1928, when decedent created the trust here in question, she went to Paradise Valley Sanitarium at National City, near San Diego, California. She desired to get away from Harrow.

On the evening of March 19, 1928, decedent's doctor called Sydney and requested him to come to the sanitarium immediately because Harrow had been coming there frequently and disturbing decedent by making demands upon her for advances of money, and that on that morning decedent had walked downstairs from her room and was sitting out in the front garden when Harrow came; that while he was conversing with her he suddenly stepped off a few feet and threw a bunch of keys at decedent, hitting her in the face. The keys cut her. Sydney went to his mother at once. She was in a very nervous conditions and seriously ill. When she was in such a state she cried frequently and her digestion was upset. She was under the care of a physician while she was at the sanitarium.

She left the sanitarium within a month or two, having improved rapidly after she created the trust, as hereinafter related.

After Sydney and decedent talked the matter over, Sydney went into San Diego and met an attorney whom he knew. He consulted with the attorney on the problem and the attorney suggested the creation of a trust to meet the situation. Numerous conversations were had between decedent and her attorney. Sydney was present at the conferences. Decedent expressed her intention to divest herself of all her property and in such a manner that it would not be subject to Federal estate tax. In preparation of the trust agreement, decedent, Sydney, Helen, and the attorney discussed the making of the trust absolutely irrevocable, in order that there should be no Federal estate tax charge against it, and the attorney prepared the trust under the law then in force and advised decedent that it would not be subject to estate tax.

Sydney and Helen were interested in the property and felt that part of it belonged to them since it had been left by their father. Decedent willingly recognized this fact in making provision in the trust for the children.

The entire matter was handled expeditiously, and on March 24, 1928, decedent executed the trust instrument. During this time decedent was seriously ill, but she made no remarks of expecting death or being near death.

Decedent was a good business woman and did not

want to sign the trust since she realized that by doing so she would lose complete control of her property. However, she felt it was the only way to get free from the demands of Harrow and to prevent him from obtaining any part of her property. Decedent transferred everything she owned to the trust, except her car, jewelry, and her salary of \$70 per month as president of the Hinds Estate, Incorporated, and \$5,418.51 of her savings account with the Southern Trust and Commerce Bank of San Diego, \$15,000 being drawn from this account and placed in the trust. Of the balance, \$5,000 was withdrawn and paid to Harrow as a property settlement in connection with the divorce action which he was bringing.

The Bank of Italy National Trust and Savings Association was named trustee of the trust. Its duties and powers as trustee included the following:

a. The Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments shall be on such security or in such securities as may be lawful for the investment of the funds of savings banks in the State of California; the Trustee shall act with diligence to so hold and manage the Trust Estate and the property and funds of the Trust Estate that the net income of the Trust Estate shall be as large

as possible within the limit of the restrictions hereinbefore set forth.

* * *

e. In the event that legal service or legal advice may be necessary in order to preserve or protect the Trust Estate the sole right to select and appoint the attorney or attorneys to represent the Trust Estate shall be in any two of the following persons, to wit: (1) The Trustor; (2) Helen B. Kendall; and (3) Sydney M. Higgins; after the death of the Trustor such right to appoint and select such attorney or attorneys shall be in the said Helen B. Kendall and Sydney M. Higgins, or the survivor of them.

f. The Trustee shall pay out of the corpus of the Trust Estate the funeral expenses of the Trustor, upon the death of Trustor, the Trustee shall also pay out of the corpus of the Trust Estate all inheritance and estate taxes owing by the estate of the Trustor or by the beneficiaries herein designated upon the death of Trustor.

With respect to the current net income, the trust indenture provided as follows:

5. During the continuance of this trust the net income of the Trust Estate remaining after payment of the costs and expenses of the administration and management of this Trust shall be paid by the Trustee as follows:

A. During the lifetime of the trustor:

a. Seventy-five Dollars (\$75) per month to Helen B. Kendall, or if she be dead to her issue by right of representation.

b. Seventy-five Dollars (\$75) per month to Sydney M. Higgins, or if he be dead to his issue by right of representation.

c. The entire balance of the net income of the Trust Estate to the Trustor.

B. After the death of the Trustor:

In equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of said beneficiaries then the share of such beneficiary shall be paid to the issue of such deceased beneficiary by right of representation.

Sydney and Helen have each been receiving monthly payments as above provided.

By its terms the trust is to terminate upon the death of decedent and both of her children, at which time the corpus is to be distributed one-half to the issue of Sydney and one-half to the issue of Helen by right of representation. Failing issue of either, the entire corpus is to go to the issue of the other. Failing issue of both, the corpus is to go to the heirs at law of Sydney and Helen.

The trust is declared to be irrevocable. However, the trustor during her lifetime reserved the right from time to time to appoint a new and different trustee being restricted only to an incorporated trust company authority to do a trust business in the State of California. In accordance with that reserved power decedent twice changed the trustee.

Paragraph 7 of the trust indenture provides as follows:

If it should happen during the continuance of this

trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts.

Decedent's marriage to Harrow was terminated by a final decree of divorce issued July 6, 1929. On August 30, 1929, decedent had her name changed back to Higgins.

Early in 1941 decedent desired to alter or amend the trust indenture so as to relieve the trustee of the restrictions contained in subparagraph a of paragraph 3, supra, which respect to investing the trust funds "in such securities as may be lawful for the investment of the funds of savings banks in the State of California." Therefore, decedent had her two children, Sydney and Helen, join her in filing with the Superior Court of the State of California, on February 6, 1941, a document captioned "Complaint for Declaration of Rights under Trust Indenture and for Equitable Relief." The trustee was named defendant. In the complaint it was alleged that decedent "did not and could not anticipate the

economic changes that have taken place since March 24, 1928, upon which said date said Trust was established" and as a consequence the income from the restricted investments would probably be so small that an application to the Court for invasion of corpus under paragraph 7, *supra*, would be required.

The trustee-defendant filed an answer on February 25, 1941, in which substantially all of the allegations of fact contained in the complaint were admitted and in which the trustee joined decedent in praying for such decision and judgment as the Court considered proper in the premises. On March 13, 1941, the Court entered its decree changing subparagraph a of paragraph 3 of the trust indenture to read as follows:

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate, and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments hereafter from time to time made by the Trustee shall be in bonds, whether the same be lawful for the investment of funds of savings banks in California or not, and in such preferred and/or common stocks as the Trustee may from time to time select; the Trustee shall act with diligence and shall so hold and manage the trust estate and the property and funds composing the same that the net income of the Trust Estate shall be as large as possible within the limits of the restrictions hereinabove set forth.

The form of the court decree entered March 13, 1941, "did not truly express the agreement of the parties" so, on April 19, 1941, decedent again went to court, this time filing a "Notice of Motion to Vacate and Set Aside Judgment and Enter Judgment in Lieu Thereof." On April 21, 1941, the Court entered another decree again changing subparagraph a of paragraph 3 of the trust indenture to read as follows:

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said estate, and shall invest and reinvest all funds of the trust estate in such manner as to produce a reasonably high net income, for which purpose the Trustee may make any investments which are of medium or higher grade; all investments hereafter from time to time made by the Trustee shall be in: bonds, mortgages, and/or trust deed notes, secured by improved real estate (whether the same be lawful for the investment of funds of savings banks in California or not), and/or in such preferred and/or common stocks as the Trustee may select, and within the investment limitations above set forth.

On May 27, 1943, decedent petitioned the Court for an order authorizing and directing the trustee to pay to her the sum of \$300 per month out of income, if available, otherwise out of corpus. The petition stated in part that the estimated available income of \$225 per month for the succeeding twelve months "is insufficient to adequately provide for her comfort and well-being, and that she has no

other means of support or other income." No one appeared to oppose the granting of the relief prayed for and on June 11, 1943, the Court entered its order authorizing and directing the trustee to make the payment of \$300 per month "paying thereon the net income from said trust and in addition thereto such part of the corpus of the trust estate as may be necessary to make such monthly payments until the further order of this Court."

On October 25, 1943, decedent filed with the Court a Petition for Order Allowing Additional Payment from Corpus of Trust. The petition stated in part that in previously petitioning the Court for \$300 per month, a payment of \$75 per month to her chauffeur had been overlooked so that the net income available to her amounted to only \$225 per month; furthermore, in the past sixty days, due to the pending liquidation of Hinds Estate, Incorporated, for salary of \$70 per month as vice-president had been discontinued. In praying for an order authorizing and directing the trustee to pay her \$445 per month (\$300 plus \$75 plus \$70 out of income, if available, otherwise out of corpus), decedent stated in her petition as follows:

That the whole of said trust estate was set up out of petitioner's own funds and for her benefit and support; that she is over seventy years of age, and has need of the comforts it can give her as never before.

On November 19, 1943, decedent filed with the Court an Amendment to Petition for Order Allow-

ing Additional Payment from Corpus of Trust in which the prayer of her petition filed on October 25, 1943, was amended to read as follows:

Wherefore, petitioner prays for an order of Court authorizing and directing the First National Trust & Savings Bank of San Diego, as Trustee, to pay to petitioner or her order as Trustor under said Trust Indenture, or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance, the sum of Four Hundred and Forty-five (\$445.00) Dollars per month, paying the same out of the net income available for said purpose, but if said income is insufficient to pay said sum, then out of the balance of the corpus of said trust estate.

On the same day, November 19, 1943, there being no one appearing in opposition to the petition, the Court entered its order authorizing and directing the trustee to make payments as prayed for in the petition of October 25, 1943, as amended on November 19, 1943.

Pursuant to the Court orders of June 11, 1943, and November 19, 1943, the trustee paid to decedent out of corpus of the trust the following amounts:

1943 (subsequent to June 11)	\$ 624.06
1944	1,175.17
1945 (prior to decedent's death on March 3)	130.25
Total payments out of corpus	\$1,929.48

All of the Court proceedings detailed above were

uncontested. Except for the original petition to alter or amend the trust, in which decedent was joined by her two children, decedent alone, through her attorney, filed all subsequent petitions, although the names of the children appear in the captions. Neither of the children ever requested an increase in their monthly payments of \$75 each from the trust; nor did they ever petition the Court for payments out of corpus. No corpus was ever used for the benefit of either of the two children.

Subsequent to the death of decedent, there was paid out of the corpus of the trust estate the following items:

4/10/45—Bradley-Wollman Mortuary fu-	
neral expenses	\$ 574.94
8/22/45—W. S. Heller, County Treasurer	
California State Inheritance	
Tax in matter of Estate of Dell	
Hinds Higgins, deceased, per or-	
der of fixing Inheritance Tax	
dated 8-1-45	\$3,262.44

In the Federal estate tax return the funeral expenses in the amount of \$574.94 were included in the total deductions claimed of \$2,477.38.

The property comprising the trust estate on the date of decedent's death consisted of bonds, preferred and common stock, and \$1,539.81 in cash, making an aggregate total of \$188,302.40.

At the time of her death decedent owned only her car, her jewelry, and cash in the amount of

\$1,980.27. Decedent's last will, dated April 8, 1940, reads as follows:

I give to my daughter Helen B. Kendall all my clothes, ornaments, everything in my home, except the jewelry I have already willed to others—for her to take and keep as her own. All my things in Helen's home are to be hers also.

Opinion

As to the portion of the trust from which decedent reserved the right to the income for her life, there can now be no doubt of the includibility in the gross estate, notwithstanding that the trust was created prior to 1931. *Commissioner v. Estate of Church, ... U. S. ... (January 17, 1949).*

Inclusion of the balance is required under the principle that decedent's right to have the corpus invaded—an opportunity of which she actually availed herself on several occasions—"postponed the complete and ultimate transfer of the trust corpus until or after the decedent's death," under the principle of such cases as *Estate of Virginia H. West, 9 T. C. 736, 739.* See also *Estate of Norma P. Durant, 41 B.T.A. 462.* And whatever doubt there may have been that such an invasion affecting only a part of the estate might be too insignificant to justify taxing all of it must now yield to the principle enunciated in *Estate of Spiegel v. Commissioner, ... U. S. ... (January 17, 1949).*

Our conclusion that the trust is taxable as part of decedent's estate for the reasons given eliminates

the necessity of considering the alternative contention of a transfer in contemplation of death.

Decision will be entered for the respondent.

Received Feb. 7, 1949.

[Entered]: Feb. 16, 1949.

[Seal]

The Tax Court of the United States

Washington

Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, Deceased, SYDNEY M. HIGGINS, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered February 16, 1949, it is

Ordered and Decided: That there is a deficiency in estate tax of \$29,009.69.

[Seal] /s/ CLARENCE OPPER,
Judge.

[Entered]: Feb. 17, 1949.

[Served]: Feb. 17, 1949.

In the United States Court of Appeals
for the Ninth Circuit
T. C. Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, DE-
CEASED, SYDNEY M. HIGGINS, EXECU-
TOR,

Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION TO REVIEW DECISION OF THE
TAX COURT OF THE UNITED STATES
AND ASSIGNMENT OF ERRORS

To: the Honorable, the Judges of the United
States Court of Appeals for the Ninth Circuit:

Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, petitioner in this cause, by George H. Stone and Wm. D. Morrison, counsel, hereby files his petition for a review by the United States Court of Appeals for the Ninth Circuit of the Memorandum Findings of Fact and Opinion, and Decision, by The Tax Court of the United States entered February 16, 1949, and February 17, 1949, respectively, Docket No. 10891, determining a deficiency in petitioner's United States Estate Tax in the sum of \$29,009.69 and respectfully shows:

I.

Venue

This petition for review is filed pursuant to provisions of Section 1141 and Section 1142 of the Internal Revenue Code.

The petitioner, Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, filed Form 706 United States Estate Tax Return, date of death March 3, 1945, with the Collector of Internal Revenue of the Sixth District of California, which district includes the County of San Diego, which was the residence of the decedent; that subsequent to the decision of The Tax Court of the United States, entered February 17, 1949, the petitioner, in lieu of bond or undertaking and to stop interest from accruing in connection with the deficiency claimed, paid to the aforesaid Collector, on or about March 16, 1949, the sum of \$29,009.69 tax, together with interest in the sum of \$4,849.45, making a total payment to the said Collector of \$33,859.14.

II.

Nature of the Controversy

On May 13, 1946, the petitioner herein filed with The Tax Court of the United States, pursuant to the provisions of the Internal Revenue Code, his petition and subsequently his amended petition requesting the redetermination of the deficiency of United States Estate Tax, date of death March 3, 1945, in the sum of \$29,009.69, as shown by official

notice of deficiency mailed by the respondent to the petitioner under date of March 20, 1946.

The respondent filed his answer to the amended petition June 24, 1946, admitting the jurisdictional facts but generally denying all of the other allegations of the amended petition.

The amended petition to The Tax Court of the United States herein in substance alleges that:

(a) A trust indenture dated the 24th day of March, 1928, was made and entered into by Dell M. Harrow, who later became known as Dell Hinds Higgins, trustor (now deceased), and the Bank of Italy National Trust and Savings Association, subsequently The First National Trust and Savings Bank of San Diego, California, became trustee under the said trust indenture.

The trustor (now deceased) did by the said indenture irrevocably divest herself without reversion of the corpus of the property transferred to the trustee.

(b) The petitioner contends the decedent, who was approximately 59 years of age at the date of the trust indenture, which was March 24, 1928, was in good health, did not make the gift or transfer the property in contemplation of death, the trust was made for a reason connected with life, and she lived to the age of about 76 years, which was approximately 17 years after the trust indenture was entered into.

(c) The petitioner contends that no part of the corpus of the trust created by decedent March 24, 1928, as valued at date of death, in the sum of

\$188,302.40, should be included as a part of either the gross or net Estate of Dell Hinds Higgins, Deceased.

(d) The petitioner contends that the transfer of the property as set out in the said trust indenture of March 24, 1928, which by its terms was irrevocable, fully, completely, and without reversion, divested the trustor of the property transferred during her lifetime, was not made in contemplation of death and was not intended to take effect in possession or enjoyment at decedent's death but was effective at the date of the trust indenture, namely, March 24, 1928, and that the value of the property in controversy in the sum of \$188,302.40, does not come within the provisions of Section 811(c) as was erroneously determined by the Commissioner.

(e) The petitioner contends that the trustor (now deceased) did not reserve unto herself the power to alter, amend, revoke, or terminate the trust, that on March 24, 1928, the trustor fully, completely, and without reversion divested herself of the property in controversy valued at date of decedent's death at \$188,302.40, and the said trust is not subject to inclusion in either the net or gross estate under the provisions of Section 811(d) as was erroneously determined by the Commissioner.

(f) The petitioner contends that the decedent transferred the property, which at the time of her death was valued by the Commissioner at \$188,302.40, fully, completely, and without reversion and at the date of the transfer which was March 24,

1928, neither Section 811(c) nor 811(d) of the Internal Revenue Code had at that time been enacted by Congress. The Commissioner erroneously construed the aforesaid sections of the Code as applicable to the value of the trust property at the date of the decedent's death and erroneously determined a deficiency of estate tax liability of \$29,009.69.

(g) The petitioner contends the inclusion of the value of the trust property in either the net or gross value and the determination of a deficiency of estate tax, or the assessment of a tax thereon, is erroneous on the part of the Commissioner and is contrary to the Fifth and the Fourteenth Amendment to the Constitution of the United States of America.

The Commissioner of Internal Revenue determined the Estate Tax deficiency, \$29,009.69, by including in the gross estate the corpus of a certain trust created by decedent, March 24, 1928, and valued at the date of death, March 3, 1945, in the amount of \$188,302.40 on (any one of) the following grounds:

(1) It represented an *inter vivos* transfer made in contemplation of death within the meaning of Section 811(c) of the Internal Revenue Code.

(2) It represented an *inter vivos* transfer intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811(c) of the Internal Revenue Code.

(3) The decedent reserved the power to alter, amend, revoke, or terminate the trust within the

meaning of Section 811(d) of the Internal Revenue Code.

On September 22, 1947, the cause was heard before Honorable Clarence V. Opper, Judge, Division 14, of The Tax Court of the United States, sitting at Los Angeles, California. Petitioner and respondent each filed an opening brief and each filed a reply brief and the cause was submitted for decision. The Tax Court of the United States entered its Memorandum Findings of Fact and Opinion February 16, 1949, and the final Order and the final Order and Decision was entered February 17, 1949, finding a deficiency of \$29,009.69.

III.

Designation of the Court of Review

The said petitioner being aggrieved by the Memorandum Findings of Fact and Opinion, and Order and Decision of The Tax Court of the United States desires a review thereof, pursuant to the provisions of the Internal Revenue Code, by the United States Court of Appeals for the Ninth Circuit, within which Circuit is located the office of the Collector of Internal Revenue of the Sixth District of California to whom the said petitioner made his United States Estate Tax Return, date of death, March 3, 1945.

IV.

Assignment of Errors

Now Comes the petitioner, Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, and assigns as errors in the Memorandum

Findings of Fact and Opinion, and Order and Decision, the following acts and omissions of The Tax Court of the United States:

- (1) The Findings of Fact of The Tax Court are not supported by the evidence;
- (2) The failure to hold the transfer of the corpus of the trust of March 24, 1928, was an inter vivos transfer, and not made in contemplation of death;
- (3) The failure to hold that the transfer was inter vivos and was intended to take effect in possession or enjoyment at the time it was made, namely, March 24, 1928, within the meaning of Internal Revenue Code, Section 811(c);
- (4) The failure to hold that the decedent did not reserve the power to limit, amend, transfer, or revoke the trust within the meaning of the Internal Revenue Code, Section 811(d);
- (5) The failure to determine that the transfer of the gift was made prior to March 3, 1931, and the value of the property of the trust was for that reason not subject to estate tax;
- (6) The failure to hold that said gift was made for a purpose connected with life: namely, to divest herself of the property so that her then husband could not get it and for that reason not subject to estate tax;
- (7) The failure to find that the gift could not have been made in contemplation of death as the trustor was in normal health at the time the trust was created, March 24, 1928, and lived seventeen years thereafter;
- (8) The failure to find that the property of the

trust was not subject to estate tax pursuant to Section 811(c) and/or Section 811(d) of the Internal Revenue Code as both sections became effective subsequent to the effective date of the trust, March 24, 1928, were not retroactive and for that reason the Decision was contrary to the Fifth and to the Fourteenth Amendment to the Constitution of the United States of America;

(9) The failure to find the Trustor did not retain a string on the corpus of the trust property;

(10) The failure to hold that there was no possibility of the trust property reverting to the trustor;

(11) The failure to determine the trustor only reserved a part of the income of the trust property to herself as a definite amount of the income was at the time the trust was created given to her daughter Helen and her son Sydney;

(12) The failure to find the trust indenture was irrevocable and the trust property passed completely out of the control of the trustor;

(13) The failure to hold the trustor's estate possessed no right or interest in the trust property at the time of the trustor's death as the transfer of the trust property passed on March 24, 1928, at the time the trust was created.

Wherefore petitioner prays that said errors be corrected and that the judgment and findings of The Tax Court of the United States be reversed and that judgment be entered for the petitioner for the estate tax and the interest thereon which has been

paid to the said Collector in the total sum of \$33,859.14, together with interest thereon from and after the date of payment thereof.

ESTATE OF DELL HINDS
HIGGINS,
Deceased.

By /s/ SYDNEY M. HIGGINS,
Executor.

/s/ GEORGE H. STONE,
Counsel for Petitioner.

/s/ WM. D. MORRISON,
Counsel for Petitioner.

State of California,
County of Marin—ss.

Sydney M. Higgins, being first duly sworn, deposes and says: That he is Executor of the Estate of Dell Hinds Higgins, Deceased; that as such Executor he is the petitioner above named; that he has read the foregoing Petition and knows the contents thereof and that the same is true of his own knowledge and belief, except as to the matters which are therein stated upon his information or belief and as to those matters that he believes it to be true.

/s/ SYDNEY M. HIGGINS.

Subscribed and sworn to before me this sixth day of May, 1949.

[Seal] /s/ ARNOLD WARE JONES,
Notary Public in and for the County of Marin,
State of California.

My Commission Expires December 17, 1950.

Received May 11, 1949, T.C.U.S.

Filed and Docketed May 11, 1949, T.C.U.S.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION TO REVIEW
DECISION OF THE TAX COURT OF THE
UNITED STATES AND ASSIGNMENT OF
ERRORS

To: Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C., Charles Oliphant, Attorney for Respondent, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

You Are Hereby Notified that the petitioner, Sydney M. Higgins, Executor of the Estate of Dell Hinds Higgins, Deceased, on the 11th day of May, 1949, filed with the Clerk of The Tax Court of the United States, Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States heretofore rendered in the above entitled cause.

A copy of the petition for review and the assignment of errors is hereby filed and served upon you.

Dated at San Diego, California, this 11th day of May, 1949.

Respectfully,

/s/ GEORGE H. STONE,

Counsel for Petitioner.

/s/ WM. D. MORRISON,

Counsel for Petitioner.

Personal service of the foregoing notice, together

with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 11th day of May, 1949.

/s/ CHARLES OLIPHANT,
Attorney for Respondent,
Chief Counsel,
Bureau of Internal
Revenue.

Filed May 12, 1949, T. C. U. S.

The Tax Court of the United States
T. C. Docket No. 10891

ESTATE OF DELL HINDS HIGGINS, DECEASED, SYDNEY M. HIGGINS, EXECUTOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF CONTENTS OF
RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

You will please transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit, duly certified as being the originals, or a transcript of your record, or copies of orders,

the following documents and records without diminution in the above entitled cause in connection with the Petition to Review by the said Court of Appeals for the Ninth Circuit heretofore filed by Estate of Dell Hinds Higgins, Deceased, Sydney M. Higgins, Executor, the above named petitioner:

1. The docket entries of all proceedings before The Tax Court of the United States.
2. Petition.
3. Amended Petition.
4. Answer to Amended Petition.
5. Stipulation of Facts, filed September 22, 1947.
6. Official Report of Proceedings before The Tax Court of the United States, September 22, 1947.
7. Petitioner's Exhibits Nos. 15, 18, 19, 20, and 21.
8. Respondent's Exhibits O and P.
9. Joint Exhibits of Petitioner and Respondent—1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I, 10-J, 11-K, 12-L, 13-M, and 14-N.
10. Memorandum Findings of Fact and Opinion of The Tax Court entered February 16, 1949.
11. Decision of The Tax Court entered February 17, 1949.
12. Petition to Review Decision of The Tax Court of the United States and Assignment of Errors, filed on May 11, 1949.
13. Notice of Filing Petition to Review Decision of The Tax Court of the United States and Assignment of Errors, filed on May 12, 1949.

14. This Designation of Contents of Record on Review together with Acknowledgment of Service thereof.

Said record to be prepared as required by law and the rules of the United States Court of Appeals for the Ninth Circuit.

/s/ GEORGE H. STONE,
Counsel for Petitioner.

/s/ WM. D. MORRISON,
Counsel for Petitioner.

Acknowledgment of Service

Personal service of a copy of this Designation of Contents of Record on Review is hereby acknowledged as having been made this 6th day of June, 1949.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

Filed and Docketed June 6, 1949, T. C. U. S.

[Endorsed]: No. 12279. United States Court of Appeals for the Ninth Circuit. Estate of Dell Hinds Higgins, Deceased, Sydney M. Higgins, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed June 27, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 10891

ESTATE OF DELL HINDS HIGGINS,
DECEASED, SYDNEY M. HIGGINS,
EXECUTOR,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION

To the Honorable Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit:

Petitioner adopts as his points on appeal the assignment of errors included in the petition to review within the transcript of record.

Petitioner designates for printing the following:

1. The docket entries of all proceedings before The Tax Court of the United States.
2. Amended Petition.
3. Answer to Amended Petition.
4. Stipulation of Facts filed September 22, 1947.

5. Official Report of Proceedings before The Tax Court of the United States which appears on Pages 17 to the second line of 111, inclusive.
6. Memorandum Findings of Fact and Opinion of The Tax Court entered February 16, 1949.
7. Decision of The Tax Court entered on February 17, 1949.
8. Petition to Review Decision of The Tax Court of the United States and Assignment of Errors filed on May 11, 1949.
9. Notice of Filing Petition to Review Decision of The Tax Court of the United States and Assignment of Errors filed on May 12, 1949.
10. Designation of Contents of Record on Review and the Acknowledgment of Service thereof.
11. This Statement of Points on which Petitioner intends to rely and Designation of Parts of the Record necessary for consideration.

Said transcript to be prepared as required by law and the rules of the United States Court of Appeals for the Ninth Circuit.

That no exhibits identified as Petitioner's Exhibits Nos. 15, 18, 19, 20, and 21, Respondent's Exhibits O and P, and Joint Exhibits of Petitioner and Respondent Nos. 1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I, 10-J, 11-K, 12-L, 13-M, and 14-N, be printed in the record on review herein but any or all of said Exhibits may be referred to by counsel in their respective briefs and on oral argument,

or reproduced, in whole or in part, in an appendix to their respective briefs, and considered by the Court with the same force and effect as if included in the printed record on review; that the petitioner on review does not exclude or omit any part of the record in this proceeding.

Dated: June 10, 1949.

/s/ GEORGE H. STONE,
Counsel for Petitioner on
Review.

/s/ WM. D. MORRISON,
Counsel for Petitioner on
Review.

Statement of Service

Two conformed copies of this Statement of Points were mailed to Charles Oliphant, Chief Counsel for Respondent on Review, on June 10, 1949.

/s/ GEORGE H. STONE,
Counsel for Petitioner.

/s/ WM. D. MORRISON,
Counsel for Petitioner.

